

No. 88-1847-ASX
Status: GRANTED

Title: Ford Motor Credit Company, Inc., Appellant
v.
Department of Revenue, State of Florida

Docketed:
May 12, 1989

Court: District Court of Appeal of Florida,
First District

Counsel for appellant: Evans, Mark L.

Counsel for appellee: Dikman, Jeffrey M., Farr III, H. Bartow

Entry	Date	Note	Proceedings and Orders
1	May 12 1989	G	Statement as to jurisdiction filed.
3	Jun 12 1989		Order extending time to file response to jurisdictional statement until July 14, 1989.
4	Jun 16 1989		Brief amici curiae of Caterpillar Inc., et al. filed.
5	Jul 11 1989		Brief of appellee FL Dept. of Revenue in opposition filed.
6	Jul 19 1989		DISTRIBUTED. September 25, 1989
7	Aug 4 1989	X	Reply brief of appellant Ford Motor filed.
8	Jun 1 1990		REDISTRIBUTED. June 7, 1990
9	Jun 11 1990		PROBABLE JURISDICTION NOTED. *****
11	Jul 16 1990		Order extending time to file brief of appellant on the merits until August 10, 1990.
12	Aug 10 1990		Brief amicus curiae of Committee on State Taxation of State Chambers of Commerce filed.
13	Aug 10 1990		Joint appendix filed.
14	Aug 10 1990		Brief of appellant Ford Motor filed.
15	Aug 10 1990		Brief amici curiae of Caterpillar Inc., et al. filed.
17	Sep 5 1990		Order extending time to file brief of appellee on the merits until September 24, 1990.
18	Sep 10 1990		Record filed.
		*	Certified copy of original record received.
19	Sep 24 1990		Brief of appellee Department of Revenue of Florida filed.
21	Sep 26 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 6, 1990. (2ND CASE)
20	Sep 28 1990		CIRCULATED.
22	Oct 24 1990	X	Reply brief of appellant Ford Motor filed.
23	Nov 6 1990		ARGUED.

88-1847①

Supreme Court, U.S.

FILED

MAY 12 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1988

FORD MOTOR CREDIT COMPANY, INC.,
Appellant,
v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIRST DISTRICT

JURISDICTIONAL STATEMENT

JAMES E. TRIBBLE*
DOUGLAS H. STEIN
BLACKWELL, WALKER, FASCELL
& HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880
*Counsel of Record for
Appellant

59 pp
Caldwell

QUESTIONS PRESENTED

The two issues set forth below arise from appellant's contention in the District Court of Appeal of Florida, First District, that Florida's intangible property tax is unconstitutional because it discriminates against interstate commerce. The Florida statute taxes both non-domiciliaries, such as appellant, on intangible assets generated from personal property sales deemed to have occurred in Florida, and Florida domiciliaries, based on their ownership of intangibles. The central ground for appellant's constitutional challenge is the potential for double taxation of the same intangible assets if other states used the same taxing formula as Florida. The Florida court's rejection of appellant's challenge raises these substantial federal questions:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a *per se* basis to intangible property taxes.
2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

PARTIES

The parties are those named in the caption. In compliance with Supreme Court Rule 28.1, appellant states that it is a wholly-owned subsidiary of Ford Motor Company. Although there are numerous subsidiary and affiliate corporations of Ford Motor Company and Ford Motor Credit Company, including hundreds of local automobile, truck, and tractor dealerships, the only such corporation which is not wholly owned and which is publicly traded is Ford Motor Company of Canada, Limited, a subsidiary of Ford Motor Company incorporated under the laws of Canada and traded on the American Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL ..	8
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES:

<i>American Manufacturing Co. v. St. Louis</i> , 250 U.S. 459 (1919).....	12
<i>American Trucking Associations, Inc. v. Scheiner</i> , 483 U.S. ___, 107 S.Ct. 2829 (1987)	2, 9
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984).....	2, 9, 11
<i>Bacchus Imports, Ltd. v. Diaz</i> , 468 U.S. 263 (1984)	16
<i>Boston Stock Exch. v. State Tax Comm'n</i> , 429 U.S. 318 (1977)	8, 16
<i>Central R. Co. of Pa. v. Commonwealth of Pennsylvania</i> , 370 U.S. 607 (1962).....	18, 19
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	18
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977), <i>reh'g denied</i> , 430 U.S. 976 (1977)	14, 15
<i>Container Corporation of America v. Franchise Tax Board</i> , 463 U.S. 159 (1983), <i>reh'g denied</i> 464 U.S. 909 (1983)	8
<i>Curry v. McCanless</i> , 306 U.S. 357 (1939).....	12
<i>Florida Steel Corp. v. Dickinson</i> , 328 So.2d 418 (Fla. 1976).....	11
<i>Ford Motor Co. v. Beauchamp</i> , 308 U.S. 331 (1939) .	12, 13
<i>Ford Motor Credit Co. v. State of Fla., Dept. of Revenue</i> , 537 So.2d 1011 (Fla. Dist. Ct. App. 1988)	1, 11, 12
<i>Mobil Oil Corp. v. Commissioner of Taxes</i> , 445 U.S. 425 (1980).....	16, 17, 18

TABLE OF AUTHORITIES - Continued

Page

<i>Northwestern Cement Co. v. Minn.</i> , 358 U.S. 450 (1959)	16
<i>Ott v. Miss. Valley Barge Line Co.</i> , 336 U.S. 169 (1949)	12, 13
<i>Pac. Tel. & Tel. Co. v. Tax Comm'n</i> , 297 U.S. 403 (1936)	12, 13
<i>Pullman's Palace Car Co. v. Commonwealth of Pennsylvania</i> , 141 U.S. 614 (1891)	16, 17
<i>Reiss v. Dept. of HRS</i> , 386 So.2d 844 (Fla. 1st DCA 1980).....	6
<i>Standard Oil Co. v. Peck</i> , 342 U.S. 382 (1952).....	19
<i>State Tax Comm'n v. Aldrich</i> , 316 U.S. 174 (1942).....	12
<i>Tyler Pipe Industries v. Washington Department of Revenue</i> , 483 U.S. 232 (1987)	2, 9
OTHERS:	
28 U.S.C. §1257(2) (1982).....	2
28 U.S.C. §2103 (1982)	2
Chapter 199, Florida Statutes	7
Fla. L. 85-342 (1985)	4
Fla. Stat. §199.112	4
Fla. Stat. §199.112(1) (1983)	3, 10, 15
Fla. Stat. §199.175 (1987).....	4
Public Law 100-352 §§3, 7, 102 Stat. 662, June 27, 1988	2
U.S. Const. art. I, §8, cl. 3	3, 9

TABLE OF AUTHORITIES - Continued

Page

W. Hellerstein, <i>Is "Internal Consistency" Foolish?: Reflections of an Emerging Commerce Clause Restraint on State Taxation</i> , 87 Mich.L.Rev. 138 (1988)	19
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OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District, which appears in the appendix hereto, at App. 1-5, *infra*, is reported at 537 So. 2d 1011 (Fla. Dist. Ct. App. 1988).

The final order of the Florida Department of Revenue, which the District Court of Appeal affirmed, is unreported. It is reprinted in the appendix hereto, at App. 6-20, *infra*.

JURISDICTION

The decision of the District Court of Appeal of Florida, First District, hereinafter referred to as the DCA, affirming the final order of the Department of Revenue and rejecting appellant's constitutional challenge to Florida's intangible tax, was entered September 13, 1988. A timely motion for rehearing and clarification was denied on October 12, 1988.

Appellant filed a timely notice invoking the discretionary jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal which expressly declare valid a state statute or expressly construe a provision of the federal constitution. Upon consideration of jurisdictional briefs filed by the parties, the Supreme Court of Florida entered an order on February 22, 1989, declining to accept jurisdiction, denying the petition for review, and ordering that no motion for rehearing would be entertained by the Court. The time within which to docket this appeal thus runs from that order and expires on May 23, 1988. The memorandum

order of the Supreme Court of Florida is reproduced in the appendix at App. 21, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) (1982), as that section existed prior to the amendment enacted by Public Law 100-352 §§3, 7, 102 Stat. 662, 664 June 27, 1988, which amendment preserved unaffected the right of the Supreme Court to review, and the manner of reviewing, a judgment or decree, such as the decision of the DCA in this case, entered before the effective date of the amendment, which was September 25, 1988.

Decisions sustaining jurisdiction of this Court to review the decision on direct appeal are *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987), *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) *reh'g denied*, 469 U.S. 912 (1984) and *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987).

If this Court does not consider the appeal to be the proper mode of review, appellant respectfully requests that this appeal be acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103 (1982). Although that section was repealed along with the repeal of 28 U.S.C. §1257(2) (1982), providing for appeal to this Court of state court decisions ruling in favor of the validity of state statutes challenged on federal constitutional grounds, the repeal did not become effective until after the entry of the decision appealed. Public Law 100-352 §§3, 7, 102 Stat. 662, 664 June 27, 1988. Nevertheless, as a precaution, and to avoid any question about this Court's continued jurisdiction to entertain this appeal or to treat it as a petition for writ of certiorari, appellant is filing,

simultaneously with this jurisdictional statement, a petition for writ of certiorari in accordance with the rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provision of the Constitution of the United States of America is:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

U.S. Const. art. I, §8, cl. 3.

The relevant Florida statute is Fla. Stat. §199.112(1) (1983), which provided:

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the

sale, leasing, or servicing of real or personal property in the state.¹

STATEMENT OF THE CASE

The underlying administrative proceedings were initiated following a notice of decision and final assessment by the Florida Department of Revenue for intangible taxes, interest and penalties of more than \$2 million, allegedly owed by appellant for the years 1980 through 1982. Appellant petitioned for a formal administrative proceeding and thereafter amended its petition to assert the unconstitutionality of Florida's intangible tax because it did not meet the internal consistency test imposed by decisions of this Court under the Commerce Clause of the United States Constitution. The parties agreed to submit the case for decision by the Department of Revenue based on legal memoranda and stipulated facts, the material portions of which are summarized below.

Appellant, a wholly owned subsidiary of Ford Motor Company, is a Delaware corporation which maintains its principal place of business in Dearborn, Michigan. It is qualified as a foreign corporation to do business in Florida, and has continuously maintained a registered office and agent in Florida at all material times. During the tax years 1980-1982, appellant and its parent Ford Motor Company filed corporate tax returns in Florida. Appellant maintained seven to eight branch offices employing

¹ Fla. L. 85-342 (1985) repealed §199.112. That act created §199.175, Fla. Stat. (1987), which incorporated in revised form the provisions of former §199.112.

approximately two hundred people in Florida and maintained contractual relationships with up to one hundred and fifty authorized Ford dealers in Florida. It used, or could have used, Florida's governmental agencies and courts in perfecting and protecting the intangible assets it acquired through its business in Florida.

Appellant's principal business is financing wholesale and retail sales of vehicles manufactured by Ford Motor Company and engaging in various other types of financing in Florida and other states, resulting in the creation of intangible assets representing accounts receivable. The majority of the intangibles which appellee is seeking to tax arose in connection with the purchase of tangible personal property shipped to or located in the State of Florida.

The sample legal documents and stipulated description of the manner in which the pertinent wholesale and retail intangibles were created and handled confirm the interstate character of appellant's financing business. For example, wholesale dealer financing involved the placement of vehicle orders by Ford Motor Company franchised dealers with Ford Motor Company's district sales office in Jacksonville, Florida. These orders were forwarded by this Jacksonville office to the appropriate assembly plant, none of which was located in Florida. These orders were accepted at the assembly plants by the manufacture of the particular vehicles ordered by the dealers. Payment for vehicles financed by appellant was authorized in Michigan by the dealer's attorney-in-fact, an employee of appellant, who executed the notes and other sales instruments. Then, under the dealership agreements between Ford Motor Company and its

dealers, title to a car would pass to the dealer at the assembly plant outside Florida, when delivered to the carrier. Thus, the wholesale sales of the cars were actually consummated in other states, even though the Florida statute deemed them to be sales in Florida, since the cars were shipped to Florida.

The Department of Revenue's final order rejected appellant's non-constitutional arguments against imposition of the taxes, interest and penalties. As to appellant's contention that the intangible tax is unconstitutional because it violates the Commerce Clause of the United States Constitution, the final order stated:

This tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue. *Reiss vs. Dept. of HRS*, 386 So.2d 844 (Fla. 1st DCA 1980).

On appeal to the DCA, appellant contended that Florida's intangible tax statute violated the Commerce Clause and that this Court's decisions adopting and applying the internal consistency test were controlling. The DCA explicitly ruled on the Commerce Clause issue by holding:

We find that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, as applied to appellant, does not violate the Commerce Clause of the United States Constitution, and we affirm the order appealed.

The opinion expressly acknowledged that Florida's intangible tax applied to both "intangible property owned by a domiciliary corporation, regardless of business situs", and to intangibles resulting from "the sale,

leasing, or servicing of real or personal property in this state" The DCA nevertheless rejected appellant's argument "that these multiple bases for taxation impermissibly burden interstate commerce." The court held, based on tax cases decided by this Court under the Due Process Clause, that each state into which appellant extends its activities regarding its intangibles, thereby availing itself of the benefits of the laws of those states, may impose a tax on such intangible property. The court effectively equated the Due Process and Commerce Clauses by reasoning that decisions of this Court have "indicated that taxes which satisfy the due process clause generally will satisfy the commerce clause."

As to appellant's contention that the internal consistency test should be applied, the court observed that the test has thus far been applied only to income, franchise and excise taxes, and that this Court "has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes." The DCA concluded that the internal consistency test did not apply to a property tax, and therefore held that Florida's intangible tax did not discriminate against interstate commerce in a manner offensive to the Commerce Clause.

Appellant filed a timely motion for rehearing and clarification. Following the DCA's denial of that motion, appellant invoked the discretionary jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal that expressly declare valid a state statute or expressly construe a provision of the state or federal constitution. After considering jurisdictional briefs, the Supreme Court of Florida declined to exercise

its discretionary jurisdiction, whereupon appellant timely filed, in the DCA, its notice of appeal to this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The DCA held that Florida's intangible tax need not satisfy the internal consistency test to survive Commerce Clause scrutiny. This holding, if permitted to stand, would profoundly curtail the effectiveness of this Court's adoption of a consistent rule which can be easily and broadly applied to answer the oft-repeated question: Does a particular state taxing statute impermissibly restrict the free flow of commerce among the states, contrary to the constitution? To maintain the clarity and vitality of the internal consistency test, this Court should once again turn to its continuing obligation of "[d]efining the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

The internal consistency test had its inception in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), *reh'g denied*, 464 U.S. 909 (1983), in which this Court ruled that compliance with the Due Process and Commerce Clauses requires that a state corporate franchise tax employing a unitary business principle must apply a "fair" formula to apportion the income of that business within and without the state. To be "fair" the apportionment formula must have "internal consistency" – that is, "the formula must be such that if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169.

Thus the plain purpose of the rule is to eliminate exposure to multiple state taxes which burden interstate commerce.

This Court has since applied the internal consistency test to resolve Commerce Clause challenges to various forms of state taxation. In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court applied the test to strike down West Virginia's statute which taxed unapportioned gross receipts from goods sold in interstate commerce to customers located in West Virginia, but which exempted local manufacturers from the tax. This Court ruled that the West Virginia tax scheme failed the internal consistency test and thus discriminated against interstate commerce by imposing a risk of multiple taxation. Based on the internal consistency test, this Court rejected West Virginia's contention that the taxpayer was required to prove that taxes imposed by other states had actually resulted in an increased tax burden on taxpayers engaged in interstate commerce. *Id.* at 644.

In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987), this Court applied the internal consistency test to strike down lump sum annual taxes imposed by the State of Pennsylvania on trucks using its highways. This Court determined that Pennsylvania's axle tax

has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the state that enacted the measure rather than 'among the several states' U.S. Const., Art I, §8, cl 3.

Id., 107 S.Ct. at 2842. In *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987) decided on the same date as *Scheiner*, this Court again followed *Armco*

and applied the internal consistency test in holding that a manufacturing tax imposed by the State of Washington only on in-state goods sold to out-of-state purchasers discriminated against interstate commerce in violation of the Commerce Clause.

If, as assumed by the internal consistency test, other states followed Florida's taxing scheme, a single intangible asset owned by appellant could be taxed by as many as three states. During the years in issue, the Florida statute provided that sales of tangible personal property were deemed Florida sales for purposes of the intangible tax if the tangible property was delivered or shipped to a purchaser in Florida, "regardless of the f.o.b. point or other conditions of sale." Fla. Stat. §199.112(1) (1983). The statute makes no provision for treating a sale that actually occurs in Florida as a non-Florida sale if the sale contemplates the subsequent shipment of the goods outside Florida, and the Department of Revenue recognizes no such distinction. This provision results in a tax not only on intangibles arising out of sales which are actually consummated in Florida according to the general law of sales, but also on intangibles generated by sales consummated in other states, which are statutorily deemed to be Florida sales because personal property is delivered or shipped to a purchaser in Florida. If all other states had the same taxing scheme as Florida, the same intangible asset could be taxed up to three times - once by the owner's state of domicile, once by the state where the underlying sale of personal property actually occurred, and once by the state to which the underlying personal property was delivered or shipped.

The potential for at least double taxation of every intangible is obvious, because the Florida statute imposes "a tax on intangible property owned by a domiciliary corporation, regardless of business situs." *Ford Motor Credit*, 537 So. 2d at 1012, citing, *Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976). Thus, if Michigan, appellant's commercial domicile, had the same taxing scheme as Florida, all intangibles owned by appellant would be taxed there. Where, as in this case, some of those same intangibles were generated as a result of sales of personal property in Florida, they would also be taxed by Florida.

The present case thus falls squarely within the rule of *Armco* and its progeny. If all other states used the same multiple bases for taxing intangibles as Florida, taxpayers engaging in interstate commerce like appellant would be subjected to more than one unapportioned tax on the full value of the same intangible asset, while taxpayers who confined their business to one state would pay only one tax. The DCA below nevertheless declined to put Florida's intangible tax to the internal consistency test, even though it acknowledged that this Court had adopted and applied the test in cases involving state income, franchise, and excise taxes. If the Florida Statute had been subjected to the test, it would have failed.

The DCA rejected appellant's constitutional challenge through reasoning wholly inconsistent with this Court's decisions defining the limits which the Commerce Clause places on the taxing power of the states. First, the DCA held that because appellant "has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states

with regard to the property, those several states, including Florida, may each impose a tax upon such intangible property." *Ford Motor Credit*, 537 So. 2d at 1012, citing *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCanless*, 306 U.S. 357 (1939). Second, while the DCA recognized that both *Curry* and *Aldrich* involved Due Process challenges, it nevertheless accepted those cases as authority for rejecting the Commerce Clause challenges as well. The court justified applying the Due Process rule to a Commerce Clause case based on its view that:

[T]he Supreme Court has indicated that taxes which satisfy the due process clause generally will satisfy the Commerce Clause.

Ford Motor Credit, 537 So. 2d at 1012, citing, *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949), *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939), and *Pac. Tel. & Tel. Co. v. Tax Comm'n*, 297 U.S. 403 (1936).

Third, the DCA held that Florida's intangible tax is not "integrally related to interstate commerce" and that the effect on appellant's interstate activities is only "incidental and indirect," citing, *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 464 (1919). Fourth and finally, the DCA rejected application of the internal consistency test based solely on its view that this Court draws a distinction between property taxes and excise taxes in Commerce Clause cases, and that:

We find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context. We therefore decline to extend the application of this test to Florida's intangible property tax.

The DCA's four-part reasoning is seriously flawed, for the cited decisions of this Court do not support either the rejection of appellant's Commerce Clause challenge to the Florida statute or the inapplicability of the internal consistency test. Moreover, the defective rationale of the decision below places a cloud of doubt around this Court's efforts to formulate a consistently practical test for resolving Commerce Clause issues arising from a wide range of state taxes.

While Due Process and Commerce Clause validity of state taxes may be coincidental in some circumstances, this Court has never broadly equated the two, as the DCA seems to have believed. The three cases cited by the DCA on this point – *Ott*, *Beauchamp*, and *Pacific Telephone* – all involved state taxes apportioned between the taxing state and other states to which the subject of the tax could be attributed. The *Ott* decision illustrates both the similarity and differences between Due Process and Commerce Clause considerations in such circumstances. *Ott* involved *ad valorem* property taxes levied by Louisiana and New Orleans on the taxpayer's barges, apportioned according to a ratio between the total number of miles of the taxpayer's barge lines in Louisiana and the total number of miles on the entire line. *Id.* at 171. This Court's opinion summarized and compared the Commerce Clause and Due Process considerations applicable to this apportioned tax:

The problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." . . . So far as due process is concerned the only question is whether the tax in

practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

Id. at 174 (citations omitted). While the above holding suggests a similarity between Due Process and Commerce Clause considerations in testing the validity of an apportioned tax, it does not support the DCA's apparent holding that if a non-apportioned tax is valid for purposes of Due Process, it also passes muster under the Commerce Clause.

The non-identity of Due Process and Commerce Clause issues in testing the validity of state taxes is evident from the four-pronged test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *reh'g denied*, 430 U.S. 976 (1977), under which a tax can withstand a Commerce Clause challenge when it "is applied to an activity with a substantial nexus with a taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the state." *Id.* at 279. That test, which has since been applied to a wide variety of taxes, contains requirements unrelated to any Due Process inquiry.

One reason the Florida tax does not meet the *Complete Auto* test is that the statute makes the tax non-apportionable. The full value of the intangible asset is deemed to have a Florida taxing situs if the owner is domiciled in Florida or if the intangible asset results from a sale of tangible property in Florida. By statutory contrivance, such Florida sales include transactions where

the sale actually occurs in some other state (i.e. "regardless of the f.o.b. point . . . ") but the property is delivered or shipped to Florida. Fla. Stat. §199.112(1) (1983).

A second reason Florida's tax does not comply with *Complete Auto* is that it discriminates against interstate commerce. The purpose of the internal consistency test is to detect such discrimination. The DCA, in purporting to adhere to the principle that a state tax is invalid if it "discriminates against interstate commerce by affording an undue advantage to local business," and in concluding that the Florida tax does not burden interstate commerce, spurned the one tool designed by this Court to resolve such questions.

If the internal consistency test is applied here, the prohibited interference with interstate commerce is self evident. Contrary to the DCA's holdings, the Florida tax is "integrally related to interstate commerce" and does afford an undue advantage to local business.

The statute is specifically designed to reach not only Florida domiciliaries but also non-domiciliaries who generate intangible assets from sales in Florida and from sales in other states involving shipment of property into Florida. By its very nature, this tax on intangibles of non-domiciliaries is integrally related to interstate commerce.

The potential for a double or even triple tax on the same intangible asset can exist only as against taxpayers engaged in interstate commerce. Those taxpayers who confine their business activities to their Florida domicile run no risk of a multiple tax burden on a single intangible asset. The Florida tax thus discriminates against interstate commerce by "providing a direct commercial advantage

to local business." *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 268 (1984), quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. at 329 and *Northwestern Cement Co. v. Minn.*, 358 U.S. 450, 458 (1959).

The decisive question which appellant will ask this Court to decide is whether its internal consistency test applies to resolve Commerce Clause challenges to state intangible property taxes. The DCA held that the test did not apply, only because the challenged tax was a property tax, not an excise or income tax such as those involved in this Court's prior decisions invoking the internal consistency test.

The DCA cited two decisions of this Court in attempting to distinguish between property and excise taxes for Commerce Clause purposes: *Mobil Oil Corp v. Commissioner of Taxes*, 445 U.S. 425 (1980), and *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*, 141 U.S. 614 (1891). Neither case supports a conclusion that the internal consistency test does not apply to property taxes.

Mobil Oil, decided several years before formulation of the internal consistency test, involved Due Process and Commerce Clause challenges to an apportioned corporate income tax imposed by Vermont on non-domiciliary corporations doing business in Vermont. The distinction between property taxes and excise or income taxes was drawn by this Court for the limited purposes of distinguishing certain property tax cases on which the taxpayer relied. Among various other grounds for rejecting the taxpayer's analogies and arguments, this Court observed that "the factors favoring use of the allocation method in property taxation have no immediate applicability to an

income tax." *Id.* at 448. Nothing in that statement or elsewhere in *Mobil Oil* supports the DCA's view that property taxes are for some undefined reason exempt from the internal consistency test or similar Commerce Clause inquiries.

The DCA's reliance on *Pullman's Palace Car* as a basis for the property tax-excise tax distinction is equally tenuous. That case involved a property tax apportioned according to the percentage of miles the taxpayer's railroad cars were run within and outside the taxing state. In upholding the tax, this Court distinguished between state license taxes on the privilege of carrying on interstate commerce, which are prohibited as a burden on commerce, and permissible taxes on personal property located within the taxing state. The validity of the property tax was confirmed however, only because the state had used a just and equitable method of apportionment. The Court reasoned that if the same method were "adopted by all the States through which these cars ran, the Company would be assessed on the whole value of its Stock, and no more." *Id.* at 617-618.

This holding demonstrates that there is no valid distinction between license taxes and property taxes for Commerce Clause purposes where, as here, an unapportioned property tax has a prohibited effect on interstate commerce. In fact, *Pullman's Palace Car* adopts an early forerunner of the internal consistency test and applies it to an apportioned property tax. The decision thus refutes the distinction drawn by the DCA and supports appellant's contention that a property tax is not exempt from the requirement of internal consistency.

The problem addressed by the internal consistency test is the prospect of multiple state taxation which tends to restrict interstate commerce by exposing those who engage in it to a greater tax burden than those who confine their activities to their home state. That problem does not depend on whether it is an excise tax or property tax that restricts the free flow of commerce – either is equally capable of having the forbidden effect.

Nothing in any of this Court's internal consistency decisions indicates that the test should not apply with equal force to any state tax which impinges on interstate commerce. Prior decisions pitting state taxes against the Commerce Clause refute any notion that there is such a fundamental difference between property taxes and excise or income taxes that different rules must be devised to test their validity under the Commerce Clause.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court reaffirmed that its goal in reviewing Commerce Clause challenges to state taxes has been to " 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' " *Id.* at 615, quoting *Mobil Oil*, 445 U.S. at 443. If, as here, the practical effect of an intangible property tax is to restrict interstate commerce, it would be neither consistent nor rational to follow a different rule than that applicable to excise taxes which have the same effect.

In dealing with Commerce Clause challenges to state taxes, this Court has guarded against multiple taxation of interstate operations, which offends the Commerce Clause, where a tax on property is involved. *Central R. Co. of Pa. v. Commonwealth of Pennsylvania*, 370 U.S. 607,

612 (1962), citing, *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952). *Central Railroad* in fact foretokened the internal consistency test when it held:

Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction.

Id. at 614. (Emphasis in original).

The DCA's opinion undertakes to create, without any clear analysis or direct authority, a broad "property tax" exception to the internal consistency test adopted by this Court. State taxpayers and taxing authorities alike need and deserve the authoritative guidance of this Court on the important issue at stake.

The substantial nature of the question here has recently been emphasized by the publication of a major law review article by one of the nation's leading commentators in this area of the law: W. Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich.L.Rev. 138 (1988). In that article, which apparently went to press shortly before the DCA's decision was released, the author addresses independently the exact issue in this case and reaches a conclusion directly opposite that of the DCA:

One final example of an existing taxing scheme that appears to violate the "internal consistency" principle is Florida's intangible property tax. The tax is imposed at a rate of one mil (\$1 per \$1,000) on all intangible property, except for obligations secured by

Florida realty. As construed by the Florida courts, the tax applies to intangible property owned by taxpayers domiciled in the state, whether or not the property has acquired a business situs in Florida, as well as to intangible property owned by taxpayers domiciled outside of Florida when the property has acquired a business situs in the state.

Id. at 162. Professor Hellerstein goes on to note that Florida has followed this Court's interpretation of the Due Process Clause as not preventing two states from taxing the same intangible property, but questions whether such a tax is valid under the Commerce Clause as expressed in the internal consistency principle. He states:

If every state adopted an intangible property tax that applied both to property owned by its domiciliaries and to property with a business situs in the state, the enterprise domiciled in one state but employing intangible property in another, where it acquires a business situs, would pay two taxes on its intangibles whereas its wholly intrastate competitor would pay but one tax. Assuming that the Court would have little difficulty in concluding that such interference with interstate capital flows affected commerce so as to warrant commerce clause scrutiny, the "impermissible interference with free trade" under the "internal consistency" doctrine would be self evident.

Id. at 162-163. Those views so contrary to the decision of the DCA, expressed by such a recognized authority in his field, provide another cogent reason why the questions presented here are so substantial as to require plenary consideration of this Court, with briefs on the merits and oral argument.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JAMES E. TRIBBLE*
DOUGLAS H. STEIN
BLACKWELL, WALKER, FASCELL
& HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880
*Counsel of Record for
Appellant

APPENDIX

**INDEX TO APPENDIX OF
JURISDICTIONAL STATEMENT**

1. Opinion of First District Court of Appeal, filed
September 13, 1988App. 1
2. Final Order Of The Department of Revenue,
dated November 19, 1987App. 6
3. Order of Florida Supreme Court Denying Dis-
cretionary Review, dated February 22, 1989 App. 21
4. Mandate of First District Court of Appeal,
dated November 14, 1988App. 22
5. Order of First District Court of Appeal, dated
October 12, 1988App. 23
6. Copy of Notice of Appeal to United States
Supreme Court filed in First District Court of
Appeal on April 5, 1989 (with proof of service
on second page)App. 24
7. Copy of receipt of clerk of First District Court
of Appeal.....App. 27
8. Copy of Notice of Appeal to United States
Supreme Court, bearing stamp of Department
of RevenueApp. 28

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FORD MOTOR CREDIT COMPANY,	* NOT FINAL UNTIL
Appellant,	TIME EXPIRES TO FILE
vs.	* REHEARING MOTION
	AND DISPOSITION
	* THEREOF IF FILED.
DEPARTMENT REVENUE,	* CASE NO. 87-2036
STATE OF FLORIDA,	
Appellee.	*
	*

Opinion filed September 13, 1988.

An Appeal from an order of the Department of Revenue.

James E. Tribble, of Blackwell, Walker, Fascell & Hoehl,
Miami, for appellant.

Jeffrey M. Dikman and J.C. O'Steen, Assistant Attorneys
General, for appellee.

WENTWORTH, J.

Appellant seeks review of a final agency order holding that appellant owes specific amounts for underpaid intangible taxes, penalties, and interest for the years 1980-1982. We find that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, as applied to appellant, does not violate the commerce clause of the United States Constitution, and we affirm the order appealed.

Ford Motor Credit Company (FMCC) is a Delaware corporation whose principal place of business is in Michigan. FMCC is authorized to do business in Florida under Chapter 607, Florida Statutes, and maintains branch

offices in the state. FMCC's principal business is financing the wholesale and retail sales of vehicles manufactured by Ford Motor Company, of which FMCC is a wholly owned subsidiary. FMCC applications for credit are submitted to FMCC Florida branch offices, which undertake the financial investigations of borrowers. In wholesale transactions, the FMCC Michigan office approves lines of credit and authorizes draws against dealers' accounts. FMCC Florida branch offices send original retail financing contracts to the FMCC Michigan office for storage. The FMCC Michigan office instructs FMCC Florida branch offices regarding banking transactions.

During the years 1980-1982, FMCC filed corporate tax returns and paid taxes due. In 1983, Florida's Department of Revenue (DOR) audited FMCC's intangible tax returns for the years 1980-1982, and proposed an assessment of tax, penalties, and interest.¹ FMCC filed a timely protest and requested a formal hearing. On the basis of a revised audit report, DOR imposed the intangible tax and delinquent and undervalued property penalties. DOR offered abatement of the undervalued property penalty, which FMCC declined. An administrative hearing officer rejected appellant's contention that Florida's intangible property tax unfairly burdens its interstate transactions, and recommended an assessment of taxes, interest and penalties. DOR entered its final order, adopting virtually verbatim the recommended order.

¹ The majority of the intangibles in question were accounts receivable by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida.

Appellant contends that application of Florida's intangible tax to its transactions violates the commerce clause by potentially exposing appellant to multiple taxation on the same intangibles. Between 1980 and 1983 section 199.112(1), Florida Statutes, provided that:

All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation. . . . This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere. . . . Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state. . . .

Chapter 199, Florida Statutes, also provided for a tax on intangible property owned by a domiciliary corporation, regardless of business situs. *See Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976). Appellant contends that these multiple bases for taxation impermissibly burden interstate commerce. But since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property. *See State Tax Commission v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357 (1939); *Dickinson*, *supra*. While both *Curry* and *Aldrich* concerned due process challenges, the Supreme Court has indicated that taxes which satisfy the due process clause generally will satisfy the commerce clause. *See Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Ford Motor Co. v.*

Beauchamp, 308 U.S. 331 (1939); *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403 (1936). The contested intangible tax in the present case is not integrally related to interstate commerce and, although it may affect appellant's interstate activities, it produces "only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government." *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 464 (1919).

Appellant nevertheless contends that its interstate activities would be unfairly burdened by multiple taxation if every other state were to adopt Florida's taxing scheme. By this argument appellant seeks application of the internal consistency test for commerce clause analysis, as propounded in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983). This test requires that a tax have "what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. *Id.* at 169. However, *Container Corp.* was a franchise tax case, involving the apportionment of a tax to reflect the proportion of business conducted within a state. Since *Container Corp.* the test has been applied only to franchise and excise taxes. See *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987); *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. ___, 107 S.Ct. 2810 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 63 (1984). The United States Supreme Court has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes. See e.g., *Mobil Oil Corp. v. Commissioner*

of Taxes, 445 U.S. 425, 448 (1980); *Pullman's Palace – Car Co. v. Commonwealth*, 141 U.S. 18 (1891). We find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context.² We therefore decline to extend the application of this test to Florida's intangible property tax.

In reaching this decision, we adhere to the principle that under the commerce clause no state may impose a tax which discriminates against interstate commerce by affording an undue advantage to local business. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). We find that Florida's intangible property tax, as applied to appellant, does not have this prohibited effect. While the tax may impact appellant's activities in interstate commerce, it does not impermissibly burden such activities and is consistent with the commerce clause of the United States Constitution.

We affirm the order appealed.

SMITH, C.J., and WIGGINTON, J., CONCUR.

² See generally, Justice Scalia's dissent in *Tyler Pipe*, *supra*, and Justice O'Connor's and Justice Scalia's dissents in *American Trucking*, *supra*.

STATE OF FLORIDA, DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

FORD MOTOR CREDIT CORPORATION,)	
)	
Petitioner,)	CASE NO. 85-1303
)	
v.)	
)	
DEPARTMENT OF REVENUE, STATE OF FLORIDA,)	
)	
Respondent.)	
)	

FINAL ORDER OF THE DEPARTMENT OF REVENUE

This Cause came on before the Governor and Cabinet, sitting as the Head of the Department of Revenue, at their regular meeting on November 17, 1987.

Ford Motor Credit Company (FMCC), Petitioner, instituted this administrative procedure to challenge the Department of Revenue (DOR) imposition of intangible property taxes, interest, and penalties for the tax years 1980 through 1982. This case was initially scheduled for hearing commencing October 1, 1985, but was continued at the request of the parties who were attempting to resolve the dispute, and was rescheduled to be heard August 5, 1986. Prior to that date, the parties agreed to waive hearing, stipulate to all relevant facts, and submit briefs and legal memoranda supporting their respective positions, with initial briefs by February 20 1987 and simultaneous submission of reply briefs by March 4, 1987.

Petitioner is represented by Martin J. Kurzer, Esquire, Blackwell, Walker, Fascell & Hoehl, One Southeast Third Avenue, Miami, Florida 33131.

Respondent is represented by Linda Lettera, Esquire, and J.C. O'Steen, Esquire, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301.

Findings of fact are those stipulated to by the parties in the prehearing stipulation. Exhibits referred to are those attached to the prehearing stipulation.

FINDINGS OF FACT

1. FMCC is a corporation organized and existing under Delaware law. FMCC maintains its principal place of business in Dearborn, Michigan. FMCC is a wholly owned subsidiary of Ford Motor Company.

2. FMCC qualified and is authorized to do business in the State of Florida pursuant to the foreign corporation provisions of Chapter 607, *Florida Statutes*, and has continuously maintained a registered office and agent in this state during the audit years at issue.

3. During the tax years 1980-1982, inclusive, FMCC and Ford filed corporate tax returns in Florida and paid the taxes due thereon under the Florida Income Tax Code; FMCC maintained 7 to 8 branch offices and employed approximately 200 people in Florida; and Ford had contractual relationships with approximately 130 to 150 authorized Ford dealers in Florida. A copy of a representative agreement between Ford and the dealers was Exhibit 3 to the Stipulation.

App. 8

4. FMCC's principal business is financing the wholesale and retail sales of vehicles manufactured by Ford Motor Company. During the audit period FMCC provided financing for the purchase of vehicles as authorized by Ford dealers from Ford Motor Company. FMCC also: provided financing for the purchase of automobiles by the public from the dealers; and engaged in commercial, industrial and real estate financing, consumer loan financing, and leasing company financing in the State of Florida as well as other states. Attached as Composite Exhibit 4 were sample documents utilized by FMCC in the above financing.

5. The majority of the intangibles in question are accounts receivables held by FMCC and owned by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the state of Florida.

6. FMCC is the holder of security agreements executed by thousands of Florida debtors. These security agreements gave FMCC a lien on tangible personal property located in the State of Florida. The Florida Secretary of State's office was utilized by FMCC during the assessment period to perfect and protect its liens created under these security agreements with Florida debtors by the filing of U.C.C. financing statements. None of the original notes are stored in Florida.

7. During the assessment period, FMCC utilized or could have utilized the Florida Courts to recover sums due by Florida debtors on delinquent accounts receivable. In addition, FMCC utilizes the Florida Department of

App. 9

Highway Safety and Motor Vehicles to perfect its liens on motor vehicles pursuant to Chapter 319, *Florida Statutes*.

8. In 1983, the Department conducted an audit of the FMCC intangible tax returns for tax years 1980 through 1982, inclusive. On June 3, 1983, the Department proposed an assessment of tax, penalty and interest in the total amount of \$2,560,379.00. See Exhibit 5. FMCC filed a timely protest.

9. On October 8, 1984, the Department issued a Notice of Decision. See Exhibit 2. On December 12, 1984, the Department acknowledged receipt of FMCC's timely November 8, 1984 Petition for Reconsideration. On February 18, 1985, the Department issued a Notice of Reconsideration. See Exhibit 6.

10. FMCC elected to file a Petition for Formal Proceedings, which was received on April 8, 1985.

11. On the basis of the revised audit report, the Department of Revenue imposed the intangible tax on FMCC for the tax years 1980 through 1982, inclusive, in the following categories, and in the taxable amounts listed as follows:

App. 10

		<u>1/1/80</u>	<u>1/1/81</u>	<u>1/1/82</u>
(1)	Commercial Finance Receivables— Retail *	\$342,892,615	\$403,061,571	\$486,412,164
(2)	Commercial Finance Receivables— Wholesale *	218,591,180	241,993,462	228,303,569
(3)	Simple Interest Lease Receivables— Retail *	66,345,902	75,978,095	71,315,777
(4)	Lease Finance Receivables *	N/A	N/A	N/A
(5)	Capital Loan Receivables *	3,112,877	2,064,698	2,419,770
(6)	Consumer Loan Receivables	10,144,531	14,122,666	18,578,699
(7)	Service Equipment Financing— Dealer I.D. Receivables	481,869	368,186	422,108
(8)	Ford Rent-A-Car Receivables **	27,825,283	26,179,377	20,362,896
(9)	Ford Parts & Service Receivables *	—0—	10,499,401	10,800,313
(10)	Accounts Receivables — Customers & Others	3,452,194	4,581,629	4,952,234
(11)	Accounts Receivables — Affiliates	1,617,880	2,914,094	4,438,849
(12)	C.I.R. Receivables **	<u>23,243,257</u>	<u>27,387,938</u>	<u>24,222,621</u>
	TOTAL FLORIDA RECEIVABLES -----	697,707,588	809,151,117	872,229,000
	TAX AT 1 MILL -----	697,708	809,151	872,229
	LESS ORIGINAL TAX PAYMENT -----	312,703	351,976	339,142
**	LESS PETITION PAYMENT ON AGREED CATEGORIES -----	51,069	53,567	44,586
	TOTAL REMAINING TAX ASSESSED -----	\$ 333,936	\$ 403,608	\$ 488,501
***	TOTAL TAX FOR ALL YEARS -----	\$ 1,226,045		
*	REVISED ASSESSMENT FIGURES			
***	DOES NOT INCLUDE \$1,386.18 OF THE PETITION PAYMENT			

12. At the time it filed its petition for a formal hearing, FMCC agreed to and paid the 1 mill tax, but no interest or penalty, on the following amounts. The taxability of these items is no longer in dispute, only penalty and interest.

	<u>1980</u>	<u>1981</u>	<u>1982</u>
(8) Ford Rent-A-Car Receivables	27,825,283	26,179,377	20,362,896
(12) CIR Receivables	23,243,257	27,387,938	24,222,621

13. Capital Loan Receivables (item 5 of paragraph 11) reflect amounts of money owed by Ford dealers to FMCC. The obligation arises from loans made to Ford dealers located in Florida to expand showroom or other facilities and for working capital.

14. The items located as (10) Accounts Receivable - Customers and Others and (11) Accounts Receivables - Affiliates in paragraph 11 reflect only the amount of accrued interest to which FMCC is entitled on notes from non-affiliates and affiliates, respectively, from the last settlement date prior to year end until the end of each respective year. The principal amounts owed on these notes, which are not secured by realty, are included in other categories. The Department does not assess a tax for similar interest when the amount owed is secured by realty.

15. Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7.

16. The Department of Revenue has imposed penalties in the amount of \$543,968 composed of \$330,051 as

the 25% delinquent penalty imposed pursuant to *Fla. Stat.* Section 199.052(9)(a) (1983), and \$15,886 as the 15% undervalued Property penalty imposed pursuant to Section 199.052(9)(d) (1983), *Florida Statutes*. The Department offered abatement of the 15% omission penalty (\$198,031) imposed pursuant to *Fla. Stat.* Section 199.052(9)(c) (1983). The closing agreement required pursuant to *Fla. Stat.* Section 213.21 reflecting this reduction of penalty was not signed by petitioner.

17. FMCC's intangible tax returns have been audited on prior occasions. The manner of reporting was identical to the manner in which FMCC reported its intangibles for tax years 1980 through 1982. The 1973-1975 and the 1976-1978 audits were "no change" audits. FMCC's method of reporting receivables generated from Florida sales was challenged by the Department of Revenue. The challenge was dropped because the Department of Revenue did not have the statutory authority to assess sales of tangible personal property with an f.o.b. point other than Florida. Chapter 77-43, Laws of Florida amended Section 199.112, *Fla. Stat.* to allow tangible personal property (sic) [to be taxed] regardless of the f.o.b. point of sale. This amendment applied to the January 1, 1978 taxable year. There was a 1978-1980 "no change" audit.

18. Ford Motor Company has filed refund claims for certain categories for the tax year 1981 and 1982. Ford Motor Company claims that it inadvertently paid intangible tax on accounts receivable owned by FMCC. As presented in the Notice of Decision, no refund will be made as it will be handled as a credit against taxes due by Ford Motor Company.

19. While not an announced policy, the Department of Revenue drafted and utilized proposed rules relating to compromising penalties. These rules are not final. Attached as Exhibit 8 were the proposed rules. A copy of these rules was provided to Petitioner by letter dated July 28, 1986. In addition, while not an announced policy the Department of Revenue utilized guidelines established by the Internal Revenue Service and federal court for compromising penalties.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

Petitioner presents six basic premises for relief which will be discussed seriatim.

First, Petitioner contends the intangible tax law is unconstitutional with its attack focused on Section 199.112, *Florida Statutes*. This tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue. *Rice vs. Dept. of HRS*, 386 So.2d 844 (Fla. 1st DCA 1980). Petitioner's position that these intangibles may not be taxed by Florida because FMCC does not have a business situs in this state is contrary to the decision rendered in *Allis Chalmers Credit Corp. vs. Dept. of Revenue*, 456 So.2d 899 (Fla. 1st DCA 1984). Under the principles announced in *Allis Chalmers*, FMCC clearly has a business situs in this State and those intangibles held

outside Florida on property located or sold in Florida are taxable.

Next, Petitioner contends that the business situs test of Section 199.112 would, under many conditions, allow for the same intangible to be taxed by two states if both have intangible tax laws like those of Florida. This is alleged to unfairly tax interstate transactions, but Petitioner does not contend in this argument that this is unconstitutional – only that it is unfair. This position is without merit. *Curry vs. McCanless*, 307 U.S. 357, 359 S.Ct. 900 (1939); *State Tax Commission vs. Aldrick*, 316 U.S. 174, 625 S.Ct. 1008, 86 L.Ed. 1358 (1942).

Petitioner next contends that Department of Revenue cannot properly tax accrued interest on accounts receivable for: (a) customers and others and (b) affiliates, because these receivables do not reflect a principal amount owed FMCC. Petitioner relies upon Rule 12C-2.10(3), Florida Administrative Code, which provides:

The fair market value of a note is presumed to be the amount of the unpaid principal as of January 1 of each year.

This, FMCC contends, allows only the principal represented by the notes and not accrued interest to be taxed. Since the notes are elsewhere subjected to the intangible property tax, FMCC contests only the tax on the accrued interest. Section 199.023(1), *Florida Statutes*, defines "intangible personal property" to mean:

All personal property which is not in itself intrinsically valuable but derives its chief value from that which it represents, . . .

The account labeled "accrued interest" is an asset of FMCC, is intangible property, and, as such, is taxable under the definition of intangible personal property above quoted. FMCC's reliance on the rule is misplaced. The rule creates only a presumption that the fair market value of the note is the unpaid principal as of January 1. If interest is also payable on this note, and this interest has accrued, this obviously increases the fair market value of the note by the value of the accrued interest or in direct proportion to the value of this accrued interest.

Next, FMCC contends Department of Revenue cannot tax capital loan receivables. With respect to these receivables secured by mortgage on real property both parties concur that those are not subject to an intangible tax. These capital loan receivables are loans made to Ford dealers to expand their showrooms or other facilities and for working capital. FMCC's interpretation of Section 199.112 that this section subjects to taxation only intangibles "arising out of, or issued in connection with, the sale, leasing or servicing of real or personal property" in Florida and since those are capital loans to improve showrooms, etc., there is no sale, lease or servicing of property and hence no authority to tax, is much too strict. Notes representing these loans are intangible personal property and it can hardly be said they were unrelated to the sale of Ford products. Thus, they did arise out of "the sale . . . or servicing of . . . personal property" in Florida.

FMCC next contends that DOR is barred from assessing interest and penalties because it failed to comply with the legislative mandate in Section 213.21(5) to promulgate rules establishing guidelines for informal conferences and for settling the taxpayer's liability for any tax, penalty or

interest assessed as provided by Chapter 199, *Florida Statutes*. Section 213.21 authorizes DOR to establish informal procedures to resolve disputes relating to the assessment of taxes, interest and penalties and subsection (5) thereof provides:

The department shall establish by rule guidelines and procedures for implementation of this section.

FMCC's contention that the failure of DOR to comply with this mandate requires dismissal of taxes, penalties and interest is without merit. Also without merit is the position that penalties and interest should be disallowed by reason of DOR failing to adopt rules for dealing with settlements. Although Section 213.21(5) has been in effect since October 1981 and DOR has only developed a proposed rule respecting settlements, it is appropriate to consider the language in *McDonald vs. Dept. of Banking and Finance*, 346 So.2d 569, 581 (Fla. 1st DCA 1977) that:

While the Florida APA thus requires rulemaking for policy statements of *general applicability*, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases. There are quantitative limits to the detail of policy that can effectively be promulgated as rules or assimilated; and even the agency that *knows* its policy may wisely sharpen its purposes through adjudication before casting rules.

Furthermore, in *Barker vs. Board of Medical Examiners, Dept. of Prof. Reg.*, 428 So.2d 720 (Fla. 1st DCA 1982), the Court stated:

The fact, however, that no rule was extant at the time Barker applied for a licensure does not necessarily mean the Board's action was void. The time has long since passed (if it ever existed) that agency action was mechanically invalidated simply because no rule

was in effect. . . . Our academic endeavors in attempting to label the action either rule or nonrule to determine whether or not it fell within section 120.52(14)'s definition of a rule have now been largely discarded. There are, however, costs exacted upon an agency which avoids the rulemaking procedure provided by section 120.54, chief among those being that the agency may be required repeatedly to defend its nonrule policy decisions in each case. *State, Dept. of Administration vs. Harvey*, 356 So.2d 323, 326 (Fla. 1st DCA 1977).

Applying these principles to the facts stipulated in the instant proceeding we have no rule in effect and the agency is required to defend its policy decisions regarding mitigating or compromising penalties and interest. Absent rules providing the agency's interpretation of the statute in question, we must turn to the statute itself for guidance.

Section 199.282, *Florida Statutes*, provides in pertinent part:

If any annual or non-recurring tax is not paid by the statutory due date, then despite any extension granted under s. 199.232(6), interest shall run on the unpaid balance from such due date until paid at the rate of 12 percent per year.

(3) If any annual or non-recurring tax is not paid or if an annual tax return is not filed by the due date, a delinquency penalty shall be charged. The delinquency penalty shall be 5 percent of the delinquent tax for each calendar month or portion thereof from the due date until paid, up to a limit of 25 percent of the total tax not timely paid.

(4) If an annual tax return is filed and property is either omitted from it or undervalued, then a specific penalty shall be charged. The specific penalty shall be 15 percent of the tax attributable to each omitted

item or to each undervaluation. No delinquency or late filing penalty shall be charged with respect to any underevaluation.

In each of the sections above quoted the mandatory "shall" is used with respect to assessing the penalties. However, Section 213.21(3) authorizes DOR to mitigate a taxpayer's liability for penalties which may be settled or compromised if it is determined that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. Here the word "may" is used which allows DOR discretion in compromising penalties. Since DOR has such discretion its decision to not compromise may be overturned only upon clear evidence that DOR abused its discretion. If FMCC's failure to pay tax on these intangibles above discussed was reasonable, then the DOR is authorized, but not directed, to mitigate the penalty.

The fundamental rule of construction is that tax laws are to be construed strongly in favor of the taxpayer and against the government and that all ambiguities are to be resolved in favor of the taxpayer, *Maas Brothers, Inc. vs. Dickinson*, 195 So.2d 193 (Fla. 1973); but exemptions to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer. *State ex rel Szabo Food Services vs. Dickinson*, 286 So.2d 529 (Fla. 1973). Mitigation of penalties is a favor authorized by the Legislature. Applying this principle to the instant case leads to the conclusion that FMCC has the burden of proving that its action in not paying the taxes here in issue was reasonable and not due to willful negligence, willful neglect or fraud. This it has failed to do.

Finally, FMCC contends that DOR is estopped from collecting interest and penalties. This is based upon FMCC reporting its intangibles in the same manner during the period 1973 through 1982, and the fact that DOR not only audited those returns, but challenged and abandoned the challenge to FMCC's method, and that because this method was accepted in the initial 1980 audit, DOR is estopped from collecting the interest and penalties here demanded. In *State, Dept. of Revenue vs. Anderson*, 403 So.2d 397 (Fla. 1981), the Court stated:

As a general rule equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances. *North American Co. vs. Green*, 120 So.2d 603 (Fla. 1959). Another general rule is that the state cannot be estopped through mistaken statements of the law. *Department of Revenue vs. Hobbs*, 368 So.2d 345 (Fla. 1st DCA), *appeal dismissed*, 378 So.2d 345 (Fla. 1979); *Austin vs. Austin*, 350 So.2d 102 (Fla. 1st DCA 1977); *cert. denied*, 357 So.2d 184 (Fla. 1978). In order to demonstrate estoppel, the following elements must be shown: (1) a representation as to a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Greenhut Constr. Co. vs. Henry A. Knott, Inc.*, 247 So.2d 517 (Fla. 1st DCA 1971).

FMCC failed to show the existence of these elements. Even though the initial audit of FMCC's 1980 intangible tax return did not challenge this return, this hardly constitutes a representation that the return is factually correct and similar later returns cannot be challenged. But even if Petitioner had satisfied the first two elements,

there has been no showing that FMCC changed its position to its detriment which is necessary before a claim of estoppel can be made.

From the foregoing, it is concluded that FMCC owes \$1,226,045, plus \$486,369 interest as of 7/20/84, and \$543,968 in penalties for underpayment of intangible taxes for the tax years 1980-1982. It is

ORDERED that the Department of Revenue enter this Final Order finding FMCC owes \$1,226,045 for underpaid intangible taxes for the tax years 1980 - 1982, plus interest to date of payment plus penalties in the amount of \$543,968.

DONE AND ENTERED this 19th day of November, 1987, at Tallahassee, Leon County, Florida.

/s/ Randy Miller
RANDY MILLER
EXECUTIVE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF FLORIDA

I hereby certify that a true and correct copy of the above Final Order was entered in the records of the Department of Revenue this 19th day of November, 1987.

/s/ Mary L. Ford
Agency Clerk

SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 22, 1989

FORD MOTOR CREDIT)
COMPANY,)
Petitioner,) CASE NO. 73,238
v.) District Court
DEPARTMENT OF) of Appeal,
REVENUE,) First District No.
Respondent.) 87-2036

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., BARKETT, GRIMES and KOGAN, JJ., concur MCDONALD, J., dissents

A True Copy	cc: Hon. Raymond E. Rhodes,
TEST: (SEAL)	Clerk
/s/ Sid J. White	James E. Tribble, Esquire
Sid J. White	J. C. O'Steen, Esquire
Clerk Supreme	Jeffrey M. Dikman, Esquire
Court.	

App. 22

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Randy Miller
Executive Director

WHEREAS, in that certain cause filed in this Court
styled:

FORD MOTOR CREDIT
CORPORATION

v.

DEPARTMENT OF
REVENUE,
STATE OF FLORIDA

Case No. 87-2036
Your Case No. 85-1303

The attached opinion was rendered on September 13,
1988, YOU ARE HEREBY COMMANDED that further
proceedings be had in accordance with said opinion, the
rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Larry G. Smith

Chief Judge of the District Court of Appeal of
Florida, First District and the Seal of said court at Tal-
lahassee, the Capitol, on this 14th day of November, 1988.

(SEAL)

/s/ Raymond E. Rhodes
Clerk, District Court of
Appeal of Florida,
First District

App. 23

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

October 12, 1988

CASE NO. 87-02036

L.T. CASE NO. 85-1303

Ford Motor Credit
Corporation

v. Department of Revenue,
State of Florida

Appellant(s),

Appellee(s).

ORDER

Motion for rehearing and clarification DENIED.

By order of the Court

RAYMOND E. RHODES
CLERK

I HEREBY CERTIFY that a true and correct copy of the
above was mailed this date to the following:

cc: Douglas H. Stein
James E. Tribble J. C. O'Steen
Jeffrey M. Dikman /s/ Karen Roberts
(SEAL) Deputy Clerk

App. 24

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 87-2036

FORD MOTOR CREDIT
COMPANY,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF FLORIDA,

Appellee.

NOTICE OF APPEAL

° NOTICE IS HEREBY GIVEN that FORD MOTOR CREDIT COMPANY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal, First District, State of Florida, filed and entered September 13, 1988, motion for rehearing and clarification denied October 12, 1988; discretionary review denied by Supreme Court of Florida on February 22, 1989, which judgment of the District Court of Appeal affirmed an order of the Department of Revenue that appellant owed certain intangible taxes, penalties and interest, and held that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, does not violate the commerce clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. §1257(2), as that section existed prior to the amendment enacted by Public Law 100-352 §3, 7, June 27, 1988, 102 Stat. 662, 664, which amendment preserved unaffected the right of the

App. 25

Supreme Court to review and the manner of reviewing a judgment or decree, such as this one, entered before the effective date of the amendment, which was September 25, 1988.

By /s/ James E. Tribble
James E. Tribble
Counsel for Appellant

BLACKWELL, WALKER,
FASCELL & HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

PROOF OF SERVICE

I, JAMES E. TRIBBLE, one of the counsel of record for FORD MOTOR CREDIT COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of April, 1989, I served copies of the foregoing notice of appeal on the Department of Revenue, State of Florida, by mailing one copy each in a duly addressed envelope, with first-class postage prepaid, to J. C. O'Steen and Jeffrey M. Dikman, Assistant Attorneys General, the Capitol - Tax Section, Tallahassee, Florida 32399-1050.

It is further certified that all parties required to be served have been served, and that the only such party is the Department of Revenue, State of Florida.

By /s/ James E. Tribble
James E. Tribble
Attorney for FORD MOTOR
CREDIT COMPANY

App. 26

BLACKWELL, WALKER,
FASCELL & HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

App. 27

DOCKET NO. 87-2036

LRB
April 5, 1989
Date

Ford Motor Credit vs Dept. of Revenue,
Company State of Florida

THIS ACKNOWLEDGES RECEIPT OF THE FOLLOW-
ING IN THE ABOVE STYLED CAUSE:

☒ Notice of Appeal with /without filing fee. To
U.S. Supreme Court
____ Petition for _____
with / without filing fee.
____ Motion for extension of time
 ___ Appellant
 ___ Appellee
____ Brief of Appellant
____ Brief of Appellee
____ Brief of Amicus Curiae
____ Reply brief
 ___ Request for oral argument
 ___ Motion for attorney's fees
____ Docketing Statement
____ Appendix to brief
____ Record on appeal
____ Notice of supplemental authority
____ Notice of voluntary dismissal
____ Notice to Invoke Discretionary Jurisdiction
with / without filing fee
____ Motion for _____

/s/ Laurie Black
Deputy Clerk
District Court of Appeal
First District

App. 28

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 87-2036

FORD MOTOR CREDIT COMPANY,	:	Received
Appellant,	:	APR 5 1989
vs.	:	OFFICE OF GEN- ERAL COUNSEL
DEPARTMENT OF REVENUE, STATE OF FLORIDA,	:	DEPARTMENT OF REVENUE
Appellee.	:	
_____	:	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that FORD MOTOR CREDIT COMPANY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal, First District, State of Florida, filed and entered September 13, 1988, motion for rehearing and clarification denied October 12, 1988; discretionary review denied by Supreme Court of Florida on February 22, 1989, which judgment of the District Court of Appeal affirmed an order of the Department of Revenue that appellant owed certain intangible taxes, penalties and interest, and held that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, does not violate the commerce clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. §1257(2), as that section existed prior to the amendment enacted by Public Law 100-352 §3, 7, June 27, 1988, 102 Stat. 662, 664, which amendment preserved unaffected the right of the

App. 29

Supreme Court to review and the manner of reviewing a judgment or decree, such as this one, entered before the effective date of the amendment, which was September 25, 1988.

By /s/ James E. Tribble
James E. Tribble
Counsel for Appellant
BLACKWELL, WALKER,
FASCELL & HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

2

No. 88-1847

Supreme Court, U.S.

FILED

JUL 11 1989

JOSEPH F. SPANIOL, JR.

CLERK

In The

Supreme Court of the United States

October Term, 1988

FORD MOTOR CREDIT COMPANY, INC.

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

J.C. O'Steen *
Jeffrey M. Dikman
Assistant Attorneys General
Department of Legal Affairs
Tax Section, Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

ATTORNEYS FOR APPELLEE
*COUNSEL OF RECORD

79 p/2

QUESTIONS PRESENTED

The principal question presented by this Motion to Dismiss or Affirm is whether the "Internal Consistency Test," which forms the backbone of Appellant's argument, applies¹ to Florida's tax on intangible personal property, where:

(a) The intangible property taxed by Florida was property which had acquired a legitimate situs within Florida.

¹FMCC and Amici Curiae misstate the questions presented.

The District Court of Appeal of Florida, First District, did not create any new law but instead, relied upon well established decisions of this Court, particularly the decisions in Curry v. McCanless, 307 U.S. 357 (1939) and State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942).

Moreover, the question presented is not whether intangible personal property is "per se" excepted from the internal consistency test but rather, whether that test has ever been applicable to a tax on intrastate property, which has never crossed state lines.

(b) The taxed intangible property never crossed state lines to enter the stream of interstate commerce. and,

(c) Florida restricted the tax base to that portion of FMCC's intangible personal property which was actually located, at all pertinent times, within Florida's geographical boundaries, so as to eliminate the necessity of apportioning from a nationwide intangible tax base.

Additionally, two preliminary questions are presented by this appeal:

1. Whether FMCC's Jurisdictional Statement, which is not in compliance with 28 U.S.C. §1257 (1982), as amended by Pub. L. 100-352, §§3, 7, 102 Stat. 662 (1988), should be treated as a petition for certiorari and not as a direct appeal of right. and,

ii.

2. Whether FMCC, as a foreign domiciliary, has standing to challenge that portion of Florida's tax which permits taxation of Florida domiciliaries and which does not affect FMCC.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were: Ford Motor Credit Company, Inc. (hereinafter, "FMCC"), Appellant herein, and the Florida Department of Revenue, (hereinafter, "Florida"), Appellee herein.

iii.

TABLE OF CONTENTS

	Page
1. Questions Presented.....	i
2. Parties.....	iii
3. Table of Contents.....	iv
4. Table of Citations.....	vi
5. Introduction.....	1
6. Jurisdiction.....	2
7. Statutory Provisions.....	3
8. Statement of the Case.....	4
9. Argument on Questions Presented.....	10

POINT I

FMCC'S JURISDICTIONAL STATEMENT, WHICH IS NOT IN COMPLIANCE WITH 28 U.S.C. §1257 (1982), AS AMENDED BY PUB. L. 100-352, §§3, 7, 102 STAT. 662 (1988), SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND NOT AS A DIRECT APPEAL OF RIGHT.....	10
---	----

POINT II

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION:.....	14
--	----

A. THE PROPERTY THAT WAS TAXED BY FLORIDA IN THIS CASE WAS PROPERTY WHICH HAD ACQUIRED A LEGITIMATE SITUS WITHIN FLORIDA.	23
---	----

Page

B. BECAUSE THE TAXED PROPERTY NEVER CROSSED STATE LINES TO ENTER THE STREAM OF INTERSTATE COMMERCE, THE COMMERCE CLAUSE IS INAPPLICABLE.....	38
C. ADDITIONALLY, WHERE THE TAXED PROPERTY IS NOT IN INTERSTATE COMMERCE, THE "INTERNAL CONSISTENCY TEST" DOES NOT APPLY BECAUSE THERE IS NO NEED TO APPORTION.....	44
D. INASMUCH AS FMCC, A FOREIGN DOMICILIARY, IS UNAFFECTED BY THAT SECTION OF FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX WHICH IS EXCLUSIVELY APPLICABLE TO FLORIDA DOMICILIARIES, FMCC LACKS STANDING.....	52
10. CONCLUSION.....	56
11. APPENDIX.....	1a.

TABLE OF CITATIONS

<u>Cases</u>	Page
<u>American Trucking Associations, Inc., v. Scheiner,</u> 483 U.S. 266 (1987).....	19, 29
<u>Armco, Inc. v. Hardesty,</u> 467 U.S. 638 (1984).....	18, 19, 29
<u>Commonwealth Edison Co. v. Montana,</u> 453 U.S. 609 (1981).....	19, 29
<u>Complete Auto Transit, Inc. v. Brady,</u> 430 U.S. 274 (1977).....	40, 42
<u>Container Corporation of America v. Franchise Tax Board,</u> 463 U.S. 159 (1983).....	19, 29
<u>Curry v. McCanless,</u> 306 U.S. 357 (1939).....	passim
<u>Florida Steel Corp. v. Dickinson,</u> 328 So.2d 418 (Fla. 1976).....	53
<u>Ford Motor Credit Corp. v. Department of Revenue,</u> 537 So.2d 1011 (Fla. 1st DCA 1988).....	24
<u>General Oil Company v. Crain,</u> 209 U.S. 211 (1908).....	41, 42
<u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965).....	54
<u>Hall v. Beals,</u> 396 U.S. 45 (1969).....	55
<u>Michelin Tire Corp. v. Wages,</u> 423 U.S. 276 (1976).....	42

<u>Minnesota v. Blasius,</u> 290 U.S. 1 (1933).....	40, 41, 42,
<u>Ott v. Mississippi Valley Barge Line Co.,</u> 336 U.S. 169 (1949).....	23, 33
<u>Pullman's Palace Car Co. v. Commonwealth of Pennsylvania,</u> 141 U.S. 18 (1891).....	17, 30
<u>State ex rel Seaboard Air Line R. Co. v. Gay,</u> 160 Fla. 445, 35 So.2d 403 (1948).....	15, 25
<u>State Tax Commissioner of Utah v. Aldrich,</u> 316 U.S. 174 (1942).....	passim
<u>Tyler Pipe Industries v. Washington Department of Revenue,</u> 483 U.S. 232 (1987).....	19, 29
<u>Valley Forge Christian College v. Americans United for Separation of Church and State,</u> 454 U.S. 464 (1982).....	53, 54

U.S. CONSTITUTION

U.S. Const. art. I, §8, cl. 3	3
U.S. Const. art. III, §2.....	55

U.S. Code

28 U.S.C. §1257 (1982).....	ii, iv, 10
28 U.S.C. §1257 (a) (1989).....	3
28 U.S.C. §1257 (2) (1982).....	10

Public Laws

Pub. L. 100-352, §§3, 7, 102 Stat. 662 (1988)	i, iii, iv, 10
--	----------------

Florida Statutes

Fla. Stat. §199.023 (1) (1983)	14, 24
Fla. Stat. §199.023 (1) (a) (1983)	14
Fla. Stat. §199.023 (1) (d) (1983)	24
Fla. Stat. §199.032 (1) (1983)	14, 24, 53
Fla. Stat. §199.052 (1) (1983)	53
Fla. Stat. §199.112 (1) (1983)	3, 4, 26, 27
Fla. Stat. §319.21 (1983)	6
Fla. Stat. §319.22 (1983)	6

Supreme Court Rules

Sup. Ct. R. 16	1
Sup. Ct. R. 22	1

Florida Rules

Fla. R. App. P. 9.020 (g)	12
---------------------------------	----

Other Authorities

Paul J. Hartman, Federal Limitations on State and Local Taxation, pages 382-388 (1981)	39, 40
84 C.J.S. <u>Taxation</u> §320 (1954)	38

No. 88-1847

IN THE
SUPREME COURT OF THE UNITED STATES

FORD MOTOR CREDIT COMPANY, INC.,

Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM

**THIS IS NOT AN APPEAL AS OF RIGHT AND
THE QUESTIONS PRESENTED ARE INSUBSTANTIAL**

Pursuant to Sup. Ct. R. 16 and 22 the Appellee, State of Florida, moves to dismiss this appeal, or to affirm the decision of the District Court of Appeal of Florida, First District, because this appeal (which is actually a petition for certiorari) does not present a substantial federal question.

All issues raised by the Appellant have been foreclosed by prior decisions of this Court. The decision of the District Court of Appeal of Florida, First District, is consistent with prior decisions of this Court, many of which are cited in the decision below, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further review.

Moreover, the decision below is consistent with this Court's decisions in Curry v. McCanless, 307 U.S. 357 (1939) and State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942).

JURISDICTION

Although this Court has certiorari jurisdiction, this Court lacks appeal jurisdiction for the reasons set forth in argument I.

STATUTORY PROVISIONS INVOLVED

This appeal (which should be treated as a petition for certiorari) raises questions of whether Florida's intangible personal property tax, as set forth in Florida Statute §199.112(1) (1983), violated the Commerce Clause. U.S. Const. art. I, §8, cl. 3.

Florida Statute §199.112(1) (1983) provided:

(1) All bills, notes, or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to

a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.

STATEMENT OF THE CASE

The following facts were not clearly stated in FMCC's jurisdictional statement.

A. Although FMCC's tangible personal property (i.e., vehicles) was shipped in interstate commerce, the challenged tax was not imposed on FMCC's vehicles. See, App. 9, item 11 and App. 10 to FMCC's Jurisdictional Statement.

B. Although promissory notes belonging to FMCC were stored outside of Florida, there is no evidence in the record below that the underlying financial obligations, which the notes merely represent, and which constitute the taxed property, ever moved

in interstate commerce.²

C. There was no evidence introduced in the record below that FMCC ever made tax payments to any state other than Florida.

D. FMCC has not established the quantity of nationwide intangible personal property owned by FMCC which would form the total tax base if Florida were constitutionally required to utilize an apportionment system in imposing its intangible personal property tax.

Moreover, FMCC's jurisdictional statement contains misstatements. Contrary to the statement made in FMCC's Jurisdictional Statement at page 6, there was no finding of fact by any court below that

² Although Amici Curiae also allege (at page one of their Jurisdictional Brief) that their intangible assets are used in interstate commerce, this allegation, which is not part of the record on appeal, should not form a basis for accepting review where there is no evidence in the record below that any of the taxed intangibles at issue entered the stream of interstate commerce.

title to the vehicles passed outside of Florida. However, there was an express stipulation of fact that "the certificate of origin usually accompanied the car to the [Florida] dealer." See, 3a., Prehearing Stipulation, Exhibit 7.

A certificate of origin is required in order to obtain a certificate of title from the Florida Department of Motor Vehicles. Fla. Stat. §§319.21, 319.22 (1983). The Florida certificate of title transfers title to the Florida consumer upon sale by the Florida dealer to the Florida consumer. Fla. Stat. §319.22 (1983).

FMCC appends the Final Order of the Department of Revenue. The Final Order of the Department of Revenue states in its Finding of Fact number 15: "Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7." App. 11 to FMCC's Jurisdictional Statement. (e.s.)

However, FMCC's Jurisdictional Statement does not include the crucial exhibit 7 to prehearing stipulation within its appendix. Therefore, Exhibit 7 is set forth in its entirety as an appendix to this motion.

The significant contents of Exhibit 7 are summarized below.

1. Solicitation of Dealer Members: "At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers." 1a.

2. Some Branch Approval of Dealer Credit: "During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May, 1982, . . . the number of branch approvals increased to approximately 35%." 2a.

3. Retail Credit Approval: Although the stipulated facts specify that dealer [i.e., wholesale] credit was approved both in Florida and outside of Florida, the

stipulated facts did not expressly specify whether retail [i.e., consumer] credit was approved by a Florida FMCC branch or by Michigan headquarters. However, a reasonable inference from the stipulated facts is that consumer credit was approved by a Florida FMCC branch.

4. Dealer Payments Made in Florida:
"The [Florida] dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida financial institution." 3a., 4a.

5. Vehicle Satisfaction Accomplished in Florida: "When the [Florida] dealer sold the car, either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch." 4a.

If a consumer wished to arrange for a loan payoff on sale of a vehicle or for other reasons, the Florida branch office of FMCC directly handled the matter and

arranged for satisfaction of the lien with the Florida Department of Motor Vehicles.

See, 11a.

6. Dealer Audits Performed By Florida Branches: "[T]he FMCC [Florida] branch also performed audits of [Florida] dealers to insure [that the] cars were not sold out of trust (i.e., without notice of the sale and satisfaction of indebtedness owed FMCC)." 6a., 7a.

7. Consumer Payments Made In Florida:
"The consumer received a payment book. Payment was made to a FMCC [branch] in care of a Florida Financial institution. . . [a] consumer could also make walk-in payments directly at an FMCC branch." 10a.

ARGUMENT

I. FMCC'S JURISDICTIONAL STATEMENT, WHICH IS NOT IN COMPLIANCE WITH 28 U.S.C. §1257 (1982), AS AMENDED BY PUB. L. 100-352 §§3, 7, 102 STAT. 662 (1988) SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND NOT AS A DIRECT APPEAL OF RIGHT.

FMCC's "Jurisdictional Statement" relies upon the jurisdictional provisions of 28 U.S.C. §1257(2) (1982), which has been amended, effective September 25, 1988 by Pub. L. 100-352 §§3, 7, June 27, 1988 (hereinafter, "the amendment").

Effective September 25, 1988, the proper procedure for seeking United States Supreme Court review of a decision of the highest state court in which review could be had is to file a petition for a writ of certiorari. See, 28 U.S.C. §1257(a) (1989). Therefore, FMCC should have filed a petition for certiorari, which seeks discretionary review, rather than appealing directly as of right.

Although there are certain narrow and inapplicable savings provisions which limit the effect of the amendment, FMCC's appeal falls outside either of the savings provisions contained within the amendment.

Those savings provisions specify that the amendment shall not affect cases pending before the Supreme Court as of the effective date of amendment and shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date. These provisions are inapplicable to the instant appeal.

This appeal was not filed until May 1989, well after the September 25, 1988 effective date of the amendment.

Moreover, the decision of the First District Court of Appeal did not become

final until after the effective date of the amendment.³

Since the decision below was not rendered until after the effective date of amendment, the savings provision for decisions rendered before the effective date of amendment is inapplicable and a petition for certiorari should have been filed instead of a Jurisdictional Statement.⁴

³Although the original decision was filed September 13, 1988, the decision expressly provided that it was "NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED." See, bold typed provision at the beginning of the Court's decision, which is contained in App. 1 to FMCC's Jurisdictional Statement. See also, Fla. R. App. P. 9.020 (g) (1988).

⁴FMCC admits on page 1 of its "Jurisdictional Statement," that a timely motion for rehearing was denied on October 12, 1988. Furthermore, on page 1 of FMCC's Jurisdictional Statement, FMCC admits that the Florida Supreme Court did not decline review until February 22, 1989. Both events occurred after the date of the amendment.

Therefore, the State of Florida respectfully suggests that FMCC's "Jurisdictional Statement" should be treated as a petition for certiorari and not as a direct appeal of right and that, if FMCC's "Jurisdictional Statement" is treated as a petition for certiorari, then, that this Motion to Dismiss or Affirm be treated as a brief in opposition to the petition for certiorari.

However, regardless of whether this Court treats the Jurisdictional Statement as a direct appeal or as a petition for certiorari, Florida argues that since the federal questions presented by this appeal are not substantial, and since FMCC lacks standing to challenge that portion of Florida's intangible personal property tax statute which taxes Florida domiciliaries, this Court should either grant Florida's Motion to Dismiss or Affirm (if this appeal is treated as a direct appeal) or deny

discretionary review (if the "Jurisdictional Statement" is treated as a petition for certiorari).

The issues involving lack of a substantial federal question and lack of standing are separately addressed below.

II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In the following subparts of this Motion, the State of Florida presents a variety of reasons for dismissing the appeal or affirming the decision below (if this appeal is treated as a direct appeal) or for denying review (if this appeal is treated as a petition for certiorari).

An overview of Florida's argument at this point would be helpful.

Fla. Stat. §199.032(1) (1983), imposes a tax on "intangible personal property" as defined in §199.023(1)(a). Fla. Stat. §199.023(1) (1983) defines intangible

personal property to include virtually any "obligation[s] for the payment of money," including accounts receivable.

Although taxable obligations include unconditional written obligations, such as promissory notes, the tax differs from a documentary tax in that the underlying intangible obligation is the subject of the tax. For this reason, the fact that a promissory note may be located outside of Florida will not affect tax liability provided that the underlying obligation or receivable is in Florida. See, Fla. Stat. §199.112(1) (1983) which provides for taxation of "obligations" regardless of "where they are kept, approved as to their creation, or paid." See also, State ex. rel. Seaboard Air Line Co. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948).

Although the original promissory notes which document or represent the underlying obligations or receivables were stored

outside of Florida, there was no evidence introduced below that the underlying intangible obligations, which constitute the taxed property, left the State of Florida to enter the stream of interstate commerce.

The majority of the intangibles in question were accounts receivables held by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the state of Florida. There is no evidence in the record that the factors which tied the property to Florida changed or diminished over time.

Nor was any evidence entered below that the underlying obligations entered the stream of interstate commerce or that Florida attempted to tax any property belonging to FMCC which was located outside the boundaries of Florida.

The only property tax cases cited by FMCC are cases involving tangible personal property which had moved or which was about to move across state lines to enter the stream of interstate commerce. See, for example, Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18 (1891).

These cases are distinguishable because the taxed property was in transit through more than one state. Where property is in transit between several states, more than one non-domiciliary state could attempt to tax the same property by asserting itself to be the place of actual situs. In these situations, this Court required apportionment among the states of actual situs, which reduced the tax base available to the domiciliary state.

However, where the property is not in transit and has acquired an actual situs (as opposed to a fictitious domiciliary

situs) solely within the boundaries of a single non-domiciliary state, there is no need to apportion. The fact that the same property could constitutionally be taxed by both the domiciliary state and the state of actual situs does not present the same problem which arises when multiple non-domiciliary states attempt to tax the same property in full. See, Curry v. McCanless, 306 U.S. 357 (1939) State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942).

Since Florida is taxing loans arising from the sale of automobiles and not the automobiles. The fact that vehicles were shipped in interstate commerce is of no constitutional relevance. The taxed intangible property has a business situs solely intrastate.

The remaining cases relied upon by FMCC are excise tax cases wherein a state seeks to directly tax interstate activity, even though the taxed portion of that interstate

activity can be said to have occurred intrastate. These excise tax cases are clearly distinguishable because Florida does not seek to tax FMCC's interstate activities.⁵

Obviously, there may be a need to apportion between states when interstate activity (or an intrastate aspect of interstate activity⁶) is the subject of

⁵See American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987); Armco, Inc. v. Hardesty, 467 U.S. 638 (1984); Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Tyler Pipe Industries v. Washington Department of Revenue, 483 U.S. 232 (1987).

⁶Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), which upheld a state tax on a local aspect of interstate activity, and which is cited by Amici Curiae on page 7 of their Jurisdictional Brief is of no guidance in this case. Although intrastate activity (such as mining) may form a part of a larger interstate activity (such as the shipment of coal to other states), and thus, may require Commerce Clause scrutiny, the tax in the instant case was imposed on exclusively intrastate property and not on an intrastate aspect of interstate activity.

taxation. However, since the intangible personal property in this case remained, at all pertinent times, within Florida and is the subject of taxation, the Interstate Commerce Clause, and hence, the "Internal Consistency Test," are inapplicable.

Although double taxation has not been established in this case, the fact that the domiciliary state could impose a similar tax on the same intangible personal property presents no constitutional obstacle. This Court has clearly held, in closely related Due Process cases, that in these narrow circumstances, double taxation of intangible personal property is permissible. See, Curry v. McCanless, and State Tax Commissioner of Utah v. Aldrich, supra.

The rationale of Curry v. McCanless and Utah v. Aldrich applies equally here: both the domiciliary state and the state of actual situs confer distinct benefits upon

the property which justifies the fair imposition of a distinct tax.

A taxpayer owes a duty to support its sovereign. Although the record does not reflect that FMCC contributes to the support of its sovereign by paying taxes on its intangible personal property, this duty, even if present, would not relieve FMCC of its equally compelling duty to pay for the protection of its assets which are actually located in Florida.

The record does not reveal the amount of nationwide intangible personal property owned by FMCC, of which an apportionment could be made, if (arguably) this were constitutionally required. However, since Florida only seeks to tax intrastate property which remains stationary within its boundaries, the need for apportionment, and hence, the need for the "Internal Consistency Test" does not arise.

Although FMCC seeks to distinguish Curry v. McCanless and Utah v. Aldrich, supra, as "Due Process" cases, the gap, if any between the Commerce Clause and the Due Process Clause is not as wide as FMCC would argue.

There are no cases cited by FMCC holding that a tax is constitutional for purposes of the Due Process Clause but nevertheless unconstitutional for purposes of the Commerce Clause, particularly where, as here, the tax is not "integrally related" to interstate commerce. See Opinion below at App. 4 to FMCC'S Jurisdictional Statement.

Yet FMCC argues for such a disparate result in this case by urging for a departure from Curry v. McCanless and Utah v. Aldrich simply because FMCC has invoked a separate constitutional provision.

The facts of Curry v. McCanless and Utah v. Aldrich have not been persuasively

distinguished, especially given the close link between the Due Process and Commerce Clauses. See, Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

Finally, FMCC lacks standing to challenge those portions of Florida's statutes upon which Florida relies when taxing its Florida domiciliaries. FMCC is not a Florida domiciliary. FMCC has not been taxed as a Florida domiciliary. These portions of Florida's statutes in no way affect FMCC.

A. THE PROPERTY THAT WAS TAXED BY FLORIDA IN THIS CASE WAS PROPERTY WHICH HAD ACQUIRED A LEGITIMATE SITUS WITHIN FLORIDA.

The intangible personal property of FMCC that was taxed by Florida was solely intangible personal property which had acquired a legitimate situs within Florida. The majority of the intangibles in question were accounts receivable held

by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. See, Ford Motor Credit Corp. v. Department of Revenue, 537 So.2d 1011, 1012 (Fla. 1st DCA 1988); App. 2 to FMCC's Jurisdictional Statement.

Fla. Stat. §199.032(1) (1983) imposes an annual tax on certain "intangible personal property." "Intangible personal property" is defined by Fla. Stat. §199.023(1) (1983) to mean "all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents. . ." (e.s.) The statute, in subparagraph (1)(d), goes on to cite examples of intangible personal property and the examples include "[a]ll notes, bonds, and other obligations for the payment of money." (e.s.).

Florida's intangible personal property tax is on the underlying obligation and not on the paper which merely documents the obligation. In other words, Florida's intangible tax is not a documentary tax. It is a tax on underlying obligations, regardless of the degree of documentation or the manner by which the obligation is documented. See, State ex. rel. Seaboard Air Line R. Co. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948).

Because Florida's Intangible Personal Property Tax is on the underlying obligation and not on the documentation, the location of the documentation is of little significance, if any.

Florida's Intangible Personal Property Tax is more closely akin to a real property ad valorem tax than to a documentary tax. Therefore, defining situs of intangible personal property to be the situs of the documentation would be as nonsensical as

stating that the situs for taxation of real estate should be determined from the location of the deed because it is the real estate which is of primary significance and not the deed. Similarly, it is the underlying obligation which is of primary significance and not the note or other documentation of receivables.

Florida has expressly rejected the shallow notion that the document situs should determine situs of the underlying intangible. For example, Fla. Stat. §199.112(1) (1983), which defines "Business Situs," specifically provided:

Business situs.--

All bills, notes, or accounts receivable, obligations, or credits, wherever situated, arising out of or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. . . . the intent further being that no nonresident, either by himself or through an

agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. (emphasis supplied).

Although the paperwork which documented the taxed obligations was stored outside of Florida and was, in some instances, approved for creation outside of Florida, Florida's tax is not imposed upon that paperwork, but rather, upon the underlying obligations which arose in connection with the sale of tangible personal property in Florida.

Those underlying obligations acquired a legitimate tax situs in Florida because the obligations arose in connection with the sale of tangible personal property in Florida. Moreover, the majority of the intangibles were accounts receivable held by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. An account receivable cannot have

value independent from the existence of a debtor.

The fact that the paperwork signed by those Florida debtors was shipped outside of Florida by FMCC cannot deprive Florida of its lawful jurisdiction to tax the underlying Florida based obligations.

Although FMCC engages in interstate activity, the tax at issue was never imposed upon the activities of FMCC in interstate commerce. Florida merely seeks to impose a property tax on intangible property which has acquired a legitimate business situs in Florida. It is constitutionally permissible for a state to tax property located within its borders. See Curry v. McCanless, 306 U.S. 357 (1939) and State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942).

Most of the cases relied upon by FMCC are distinguishable excise tax cases

wherein a state sought to tax interstate activity.⁷ This is because the "Internal Consistency Test," upon which FMCC completely relies, does not apply so as to restrict a state from assessing a property tax on any property which has acquired an actual business situs, exclusively within that state. See, Utah v. Aldrich and Curry

⁷See, American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987); Armco, Inc. v. Hardesty, 467 U.S. 638 (1984); Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983); and Tyler Pipe Industries v. Washington Department of Revenue, 483 U.S. 232 (1987).

Another excise tax case, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), which upheld a state tax on a local aspect of interstate activity, and which is cited by Amici Curiae on page 7 of their Jurisdictional Brief, also fails to offer guidance in this case. Although intrastate activity (such as mining) may form a part of a larger interstate activity (such as the shipment of coal to other states), and thus, may require Commerce Clause scrutiny, the tax in the instant case was imposed on exclusively intrastate property and not on an intrastate aspect of interstate activity.

v. McCanless, supra.

The remainder of the cases relied upon by FMCC are distinguishable cases involving tangible personal property which had either moved or which was about to move in the stream of interstate commerce so as to require an apportionment between the states through which the property had moved. See, for example Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18 (1891).

The cases involving tangible personal property moving through interstate commerce are factually and legally distinguishable from the situation where property has an actual situs exclusively in one state and a fictitious situs at the place of domicile. See Curry v. McCanless and Utah v. Aldrich, supra.

None of the cases relied upon by FMCC present the factual situation arising in this case, that is: a tax on property which

has acquired an actual situs solely within the taxing state, and which maintains that business situs within the state.

Nor does the remote spectre of double taxation have constitutional significance where the underlying facts fall squarely within the realm of constitutional taxation articulated by Curry v. McCanless and Utah v. Aldrich, supra.

Although there is no record of double taxation in this case, under Curry v. McCanless and Utah v. Aldrich, it has long been established that double taxation of intangible personal property by both the domiciliary state and the state acquiring actual situs would be constitutionally permissible. See, Utah v. Aldrich and Curry v. McCanless, supra.

The rationale of these decisions is that the taxpayer receives separate benefits from both the domiciliary state and the state where it conducts business

and receives protection of its assets. Double taxation under these circumstances is fair.

Applying this rationale to the facts of the instant case, it is clear that Florida confers numerous benefits and protections upon the property which it taxes. FMCC secures and protects its intangibles by placing liens upon Florida tangible personal property, utilizing the services of the Florida Department of Motor Vehicles and the Florida Secretary of State. If a debtor were to default, FMCC has access to Florida's Courts. Without these protections, FMCC's intangible personal property in Florida would be uncollectable from Florida debtors, and hence, valueless.

Although FMCC seeks to distinguish Curry v. McCanless and Utah v. Aldrich as Due Process cases, a tax which is "fair" for the purposes of the Due Process Clause will never place an "undue burden" on

interstate commerce. FMCC has not cited a single case which has held that a tax is "fair" for purposes of the Due Process Clause but which also holds that the same tax "unduly burdens" interstate commerce.

In fact, as noted by the First District Court of Appeals below, when a tax passes Due Process Clause standards, that tax will generally pass Commerce Clause standards also. See, Ott v. Mississippi Valley Barge Line Co. 336 U.S. 169 (1949). App. 3 of FMCC's Jurisdictional Statement.

The relationship between the Commerce Clause and the Due Process Clause is more than "coincidental," as argued by FMCC on page 13 of its Jurisdictional Statement. Both the Commerce and Due Process Clauses are concerned with fairness. In the Due Process Clause context, the issue is fundamental fairness. In the Commerce Clause context, the issue is fair "apportionment" whenever apportionment

is necessary to avoid an undue burden on interstate commerce.

In this case, apportionment is not necessary because the property actually maintained a business situs within Florida and the record does not reflect that the factors which tied the intangibles to Florida have altered or diminished over time.

Moreover, these incidental tax costs are not a "burden" on interstate commerce but instead, are a proper payment to the State and are fairly related to the benefits enjoyed in the State.

This Court has never expressed an intention to drive a wedge between the Due Process and Commerce Clauses. A tax which is fair for Due Process purposes will not unduly burden interstate commerce.

To distinguish Curry v. McCanless and Utah v. Aldrich on the sole basis that the taxes in those cases were challenged on

slightly different but closely related constitutional grounds would create an irreconcilable conflict between the Commerce Clause and the Due Process Clause.

Moreover, a departure from the principles articulated in Curry v. McCanless and Utah v. Aldrich would result in discrimination against small intrastate business by allowing large interstate business to receive full and separate benefits from more than one sovereign at no additional cost.

This Court should continue to recognize the long standing distinction between apportionment of taxation on interstate activities and the right to impose an undiminished tax on intangible property actually located, at all pertinent times, within the taxing state. Recognition of this right to tax intrastate property should not diminish the obligation of corporations engaged in interstate commerce

to pay toward the support of their lawful sovereign, should that sovereign ever decide to impose a tax in exchange for the benefits which it confers upon its corporate domiciliaries.

The rulings in Curry v. McCanless and Utah v. Aldrich, supra, are the only cases cited by either party which expressly deal with the issue of double taxation in the context of intangible personal property. The findings that such double taxation is "fair" for Due Process purposes, cannot mean that the same tax is "unfair" for Commerce Clause purposes.

Only by referring to inapplicable apportionment concepts can FMCC create sufficient confusion so as to drive a wedge between closely related Commerce Clause concepts of fairness and Due Process Clause concepts of fairness.

Although FMCC refers to a "consistent" test, it advocates a position which is

completely inconsistent with the decisions in Curry and Utah. FMCC advocates a position which, if followed by the Court, would create inconsistency between integrally related clauses of the United States Constitution.

It is reasonable and consistent to distinguish between apportionment of nationwide activity between the states and the rights of states to impose a full and undiminished tax on property which is actually situated within its boundaries, in exchange for the fairly related benefits conferred on that property.

It is reasonable and consistent to distinguish between apportionment of nationwide activity between the states and the rights of domiciliary states to impose a full and undiminished tax on the interstate property of its corporate taxpayers, in exchange for the fairly

related benefits which the sovereign confers upon each of its taxpayers.

**B. BECAUSE THE TAXED PROPERTY NEVER
CROSSED STATE LINES TO ENTER THE
STREAM OF INTERSTATE COMMERCE, THE
COMMERCE CLAUSE IS INAPPLICABLE.**

As discussed previously, there has been no showing that the accounts receivables ever crossed state lines to enter the stream of interstate commerce. Motor vehicles and other tangible property entered the stream of interstate commerce but the tax at issue was not imposed upon those tangibles. Instead, the tax was imposed upon accounts receivables which had an actual business situs in Florida.

That evidence of the underlying obligations (as opposed to the actual underlying obligations) later crossed state lines is of no significance. 84 C.J.S. Taxation §320 (1954). Situs for taxation purposes is not restricted to the place

where the certificates representing the intangibles are subsequently located. See, for example, Utah v. Aldrich, supra.

The tax was not imposed upon the documents themselves. Rather, the tax was imposed upon the underlying obligations represented by the promissory notes.

The concepts of "movement" and "flow of commerce" are fundamental to a proper disposition of this case. The taxation of property cannot offend the interstate commerce clause where that property has no actual situs (as opposed to fictitious domiciliary situs) outside the boundaries of the single taxing state and where that property remains, at all times, intrastate and outside of the stream of interstate commerce.

This topic is discussed in PAUL J. HARTMANN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, at pages 382-388 (1981). At page 383, the author notes: "[t]he cases

seem to establish that when the Court finds that the property comes to rest because of the owner's business reasons (to secure some 'independent local advantage'), the commerce clause affords no protection from taxation."

The author discusses the history of state efforts to tax property entering its borders. The author explains that prior to Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), which permitted states to fairly tax the importation process, taxation was restricted to property which had "come to rest" within the state. That is, if the property was still in the stream of interstate commerce, it could not be taxed.

Two of the cases cited by Professor Hartmann at page 383, 384 illustrate the concept of "flow of commerce." Those cases are Minnesota v. Blasius, 290 U.S. 1 (1933)

and General Oil Company v. Crain, 209 U.S. 211 (1908).

In Minnesota v. Blasius, the Court upheld a property tax on cattle which had crossed state lines into Minnesota, coming to rest within that state. The Court noted:

The tax was assessed on the regular tax day while Blasius thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax.

290 U.S. at 12

General Oil Company v. Crain, *supra*, also permitted taxation of property which was previously in movement through interstate commerce on the theory that the property had come to rest within the boundaries of the taxing state.

Minnesota v. Blasius and General Oil remain good law insofar as states continue to be able to tax property at rest within

their boundaries. Although Complete Auto further expanded state taxing authority, allowing states to directly tax the flow of commerce, nothing in Complete Auto extends the immunity of the Commerce Clause to property which remains, at all times, intrastate.

Since flow of commerce concepts are, for the most part, taken for granted, there is not an abundance of current discussion on the subject of "flow." However, in a 1976 decision of the Court interpreting the closely related Import/Export Clause, the Court upheld state taxation of tires that had come to rest and mingled with the mass of property in the state. See, Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

However, the instant case presents even less cause for Commerce Clause scrutiny than Minnesota v. Blasius, General Oil Co. v. Crain, or Michelin Tire Corp. v. Wages. The instant case is wholly void of

Interstate Commerce concerns because the intangible property never moved at any pertinent time.

In the above cases, the argument focused on whether the taxed property had "come to rest." In the instant case, the intangibles never moved in interstate commerce to begin with. Moreover, the record does not demonstrate that the intangibles were about to be moved.

The only movement in interstate commerce was the movement of vehicles across state lines and the subsequent shipment of promissory notes outside of Florida, after the notes were executed by Florida debtors. Since the tax is neither upon the vehicles nor the documents, but rather, upon the underlying obligations of the debtors, FMCC has failed to demonstrate the applicability of the Interstate Commerce Clause to a tax on its stationary intrastate property.

C. **WHERE THE TAXED PROPERTY IS NOT IN INTERSTATE COMMERCE, THE "INTERNAL CONSISTENCY TEST" DOES NOT APPLY BECAUSE THERE IS NO NEED TO APPORTION**

The taxed property never entered the stream of interstate commerce. The record does not show that any of the factors which tied the intangible personal property to the state of Florida were altered or diminished at any pertinent time.

Internal consistency is an apportionment standard. There is no need to apportion here because Florida did not tax any property outside of the boundaries of Florida. If Florida sought to tax FMCC's nationwide intangible personal property, it would then have to apportion and tax only a fair share of nationwide intangible personal property.

However, the record does not reveal what amount of nationwide intangible personal property is owned by FMCC. This

is because Florida did not seek to apportion a share of nationwide intangible personal property. Instead, Florida sought only to tax that portion of FMCC's intangible personal property which had acquired an actual situs solely within the boundaries of Florida.

The "Internal Consistency Test," which limits state taxation of interstate activity, does not restrict a state from annually assessing a property tax on any property which has acquired a legitimate situs within the state on the date of annual property tax assessment.

There is no record of actual double taxation in this case. Moreover, the hypothetical method articulated as the "Internal Consistency Test," which reduces the potential for unduly burdensome excise taxation is inapplicable to state taxation of intrastate intangible personal property.

The historical method for determining whether an excise tax violates Due Process or the Commerce Clause is to determine whether the tax "fairly apportions." By contrast, such tests are inherently and historically inapplicable to a tax on property which is located, at all pertinent times, within a state of actual situs.⁸ See, Curry v. McCanless and Utah v. Aldrich, which upheld a similar tax.

While "fairness" equally applies in the area of property taxation, "fair apportionment" cannot apply to intangible personal property which has acquired an actual business situs solely within the taxing state. Only if the non-domiciliary

⁸Contrary to the assertion of Amicus Curiae at page 10 of their Jurisdictional Brief, Florida is not attempting to argue that there is anything "talismanic" about intangible personal property taxes. Rather, Florida argues that there is no need to use apportionment tests in this case because the taxed property was located solely intrastate and never crossed state lines.

state sought to impose a tax on nationwide intangible personal property would an apportionment be necessary. It would then be necessary to apportion the share of nationwide property which the non-domiciliary state could tax.

Furthermore, the apportionment issues which arise in the case of tangible personal property, such as railroad cars, which are in movement within the stream of interstate commerce are not before this Court. The intangible personal property in this case, is not akin to railroad cars, or other tangible personal property which is frequently in transit within the stream of interstate commerce. In the instant case, the actual situs of intangible personal property was determined. Florida, where the intangible property is actually located, is entitled to impose its tax on that intrastate property.

Although a domiciliary state has long been entitled to impose an undiminished property tax upon each and every one of its taxpayers, this does not alter that the instant property was stationary, at all pertinent times, within the boundaries of the state of actual situs. The record does not reveal that the intangibles were in transit at any pertinent time, either in transit to the domiciliary state, or in transit toward any third state. Were the intangibles in transit at a pertinent date, such as the date of taxation, a Commerce Clause issue might then arise as to those particular intangibles in transit. This is not the case here.

There is a valid purpose served by the historical distinction between excise taxes and intangible personal property taxes. Situs rules, when properly applied to stationary intrastate intangible personal property, limit to two states the number of

states which could legitimately claim a right to tax that stationary intangible personal property. This reduces the risk of excessive multiple taxation, just as apportionment standards reduce the risk of excessive multiple taxation in the excise tax context.

The risk of triple taxation which is argued by FMCC is clearly a hypothetical risk (if even a hypothetical risk exists) because FMCC has not even demonstrated double taxation.

Although FMCC has not cited any case authority mandating the division of an intrastate intangible tax base between a state of actual situs and the state of domicile, a result contrary to Utah v. Aldrich, and Curry v. McCanless, supra, FMCC has cited an article from an individual author which questions the constitutionality of Florida's tax.

There is a fundamental contradiction in the author's underlying premise. Commerce Clause considerations are appropriate in income and excise tax cases wherein the transactions (or portions of the transactions) transcend state boundaries. The very purpose of apportionment is to provide a means for assigning a ratable part (i.e., assigning situs) to each respective state.

Where the taxable situs of a given property, intangible or tangible, can be definitely established because its location is fixed or determinable as being within a given state, assignment by apportionment is not required. Commerce Clause considerations (including the "internal consistency test") are wholly inappropriate.

FMCC repeatedly cants double taxation and relies upon an individual author's opinion in support of its argument.

However, FMCC omits mentioning a crucial fact.

Because FMCC is a foreign domiciliary, only that portion of its aggregate intangibles which have acquired an actual situs in Florida are included in the tax base under Florida law. If, for the sake of argument, the potential for double taxation were to be eliminated by the Court, Florida would then be entitled to tax a percentage not only of the Florida tax base but of the nationwide intangibles belonging to FMCC.

It is unknown from the record whether a percentage of FMCC's nationwide intangibles would be a greater or lesser sum than the intrastate tax base which was utilized in this case. Therefore, it is hard to envision how Florida's geographically restricted tax base unduly burdens interstate commerce when applied to a non-domiciliary corporation.

FMCC has failed to demonstrate any of the following propositions: that the "internal consistency test" applies to the instant intangible personal property tax; that double taxation exists; that a need to apportion exists; or that Curry and Utah are distinguishable on the facts.

Wherefore, the appeal from the decision below should be dismissed or affirmed for want of a substantial federal question, because Curry and Utah are well established precedent and clearly govern the issue of double taxation of intangible personal property by both the domiciliary state and the state of actual situs.

D. INASMUCH AS FMCC, A FOREIGN DOMICILIARY, IS UNAFFECTED BY THAT SECTION OF FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX WHICH IS EXCLUSIVELY APPLICABLE TO FLORIDA DOMICILIARIES, FMCC LACKS STANDING.

By FMCC's own admission, FMCC is not a Florida domiciliary. Therefore, FMCC is

without standing to challenge that portion of Florida's tax statutes, expressed in Fla. Stat. §§199.032(1), 199.052(1) (1983), which imposes a tax on the nationwide intangible personal property of a Florida domiciliary. See, Florida Steel Corp. v. Dickinson, 328 So.2d 418 (Fla. 1976).

FMCC, as a foreign corporation, was not taxed on its nationwide intangible personal property.⁹ Instead, FMCC, as a foreign domiciliary, was taxed solely upon that portion of its intangible personal property which had acquired an actual business situs in Florida.

The keystone case on standing is Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464 (1982). As this Court stated in

⁹Amicus Curiae, like FMCC, are foreign corporations and lack standing to challenge that portion of Florida's intangible tax statute which applies exclusively to Florida domiciliaries.

that case, the party bringing an action must show that:

1. The party has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant;

2. That the injury can be traced to the conduct of the defendant;

3. That the injury is likely to be redressed by a favorable decision.

Id., at 472.

Plaintiff, as a foreign domiciliary, is unable to establish these elements when it alleges that Florida should not tax Florida domiciliaries on their nationwide intangible personal property.

Moreover, this Court has held that when a plaintiff is seeking a declaratory judgment that a state statute is unconstitutional, the requirements for standing must be strictly enforced. See, Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

Furthermore, as this Court has previously noted, a federal court is constrained by the Constitution to decide only live cases and controversies. U.S. Const. art. III, §2. Federal courts may not render advisory opinions on abstract or hypothetical propositions of law. Hall v. Beals, 396 U.S. 45, 48 (1969) (per curiam).

FMCC asks this Court to decide, on a hypothetical or abstract basis that if Michigan were to pass an identical tax to that which Florida has passed, that FMCC would then be required to pay taxes to both Michigan and Florida on the same Florida based intangible personal property. This, FMCC, argues, is unconstitutional, notwithstanding the decisions in Curry v. McCanless and Utah v. Aldrich, *supra*.

The Court in Curry v. McCanless and Utah v. Aldrich was confronted with an actual case of double taxation. The Court is not directly confronted with that issue

in this case because double taxation has not been established.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or affirm the decision below for want of a substantial federal question (if the Jurisdictional Statement is treated as a direct appeal) or decline review (if the Jurisdictional Statement is treated as a Petition for Certiorari).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

J.C. O'Steen *
Jeffrey M. Dikman
Assistant Attorneys General
The Capitol, Tax Section
Tallahassee, FL, 32399-1050
(904) 487-2142

ATTORNEYS FOR APPELLEE
* COUNSEL OF RECORD

1a.
Prehearing Stipulation

Exhibit 7

FMCC operated in a competitive marketplace at both a retail and wholesale level. Most, though not all, authorized Ford dealers used the FMCC wholesale dealer plan. FMCC also handled retail and, on a very infrequent basis, wholesale financing for used cars regardless of the manufacturer so long as the used car was in the inventory of a dealer with whom FMCC had a relationship.

At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers. While some dealers did not use the FMCC plan, most did. There was no requirement that the dealer use the FMCC plan.

To use the FMCC plan, the dealer would complete an Application for Wholesale Financing and Security Agreement, which

2a.

included a designation of FMCC in Dearborn as the attorney-in-fact for the dealer. This designation authorized the execution of promissory notes and security instruments necessary for the wholesale financing plan. The FMCC branch assembled information from the dealer and undertook a financial investigation of the dealer. The amount of the line of credit sought by the dealer was the principal factor in determining whether the FMCC branch or headquarters components in Dearborn authorized the arrangement. During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May 1982, based on greater authority having been given to all branches, the number of branch approvals increased to approximately 35%.

If approval was given, the FMCC branch notified the Ford Motor Co. district sales office ("DSO") in Jacksonville, Florida.

3a.

If approval was given by a FMCC headquarters component in Dearborn, the FMCC branch was notified by Dearborn of that fact and the branch notified the DSO.

The dealer ordered cars through the DSO, which in turn placed the order with the appropriate assembly plant none of which were located in Florida. The certificate of origin usually accompanied the car to the dealer but, except for infrequent occasions, did not go through the branch in any event. At the time of delivery to the carrier, the dealer's attorney-in-fact, an FMCC/Dearborn employee, authorized the draw against the dealer's line of credit with FMCC. FMCC credited Ford Motor Co.'s account for the amount of the vehicle.

The dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida

4a.

financial institution. The FMCC branch received instructions from FMCC headquarters in Dearborn on the amount of money to be retained in this account. The FMCC branch called Mellon Bank, which was not in Florida, daily and Mellon arranged for the transfer of the balance. The wire transfer was always made to the same "pooling bank" in Pittsburgh, Pennsylvania. While the branch deposited money to the Florida bank, the branch drew its funds only from a Detroit, Michigan bank. None of the "wholesale" deposits could be used by the branch for use in financing retail transactions, or any other purpose.

When the dealer sold the car either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch. Notice then was

5a.

given to Dearborn to cancel the "wholesale" indebtedness. The dealer satisfied the principal balance due on the car. Within ten working days after month end, the FMCC branch billed the dealer for the monthly accrued interest. The dealer satisfied this amount by the billed month end (e.g. - a car is sold May 10, the dealer pays FMCC the principal amount on May 10, the interest is computed for the period May 1 - May 10, FMCC bills the dealer before the end of the first week of June, and the dealer pays the May 1 - May 10 interest by June 20). The FMCC branch would include other funds as a part of the regular "wholesale" deposits to the Florida bank.

The FMCC branch could engage in direct floor plan financing when "dealer trade" occurred. This transaction is explained as

6a.

follows: Dealer Red had a red car. Dealer white had a white car. White sells the white car to Red and receives a check from Red payable to White. White also wants a car to sell so he gets the red car, too. White goes to FMCC branch, gets a check for Red, finances the red car and pays off the Red. Red now has and sells the white car. White now has: paid off FMCC for the white car; "brought" the red car; and financed the red car with the FMCC branch (not Dearborn). The dealer also could simply transfer the car to another dealer subject to approval by the FMCC branch. Under the terms of the transfer, FMCC's security interest would simply to be transferred with the car to the new dealer.

Aside from handling dealer money and dealer trades, the FMCC branch also performed audits of dealers to insure cars were not sold out of trust (i.e., without

7a.

notice of the sale and satisfaction of the indebtedness owed to FMCC).

The Florida FMCC branches also were involved in wholesale and retail financing of tractors and farm equipment. At the retail level, the process was identical to the process used for cars, although a UCC statement was filed in the State of Florida for items to be kept in Florida. At the wholesale level, the dealer provided the FMCC branch with a promissory note covering the entire line of credit. Documentary stamps were affixed locally (i.e. in Florida) to the notes and notes were retained locally. The dealer, however, ordered the tractor through the same mechanism used for cars and FMCC paid Ford Motor Co. in Michigan. If the dealer exceeded the amount on the note, a new additional note with stamps affixed was obtained.

8a.

At the retail level, FMCC actively competed with local banks to provide financing. The dealer could submit a proposed retail contract to FMCC and other institutions for financing to maximize the likelihood that the customer would obtain financing approval and thereby complete a sale. The retail application was submitted to the FMCC branch, which conducted a financial check on the consumer. If the deal were accepted, the dealer satisfied its wholesale obligation on the vehicle. Simultaneously or shortly thereafter, the dealer formally assigned the financing contract to FMCC. The dealer then could either: 1) present the contract to the FMCC branch and get a check directly, which was rare; or 2) prepare and submit a sight draft to a Florida bank for payment. If the FMCC branch paid the bank with the

9a.

FMCC Michigan check the same day the draft was presented, the bank paid the dealer on the sight draft through normal banking channels. FMCC and the dealer exchanged checks - they did not simply use accounting book entries to eliminate the wholesale receivable.

The dealer received the principal amount (purchase price less the down payment) from the FMCC branch on the retail financing contract. The dealer could "sell" the note to FMCC under a repurchase or without recourse provision. Under the repurchase provision, if the purchaser defaulted, FMCC repossessed the car and presented it to the dealer for repurchase. If the note were with recourse, FMCC handled the problem directly. FMCC repossessed the car, and sold it at the automobile wholesale auction.

If the retail financing contract was

10a.

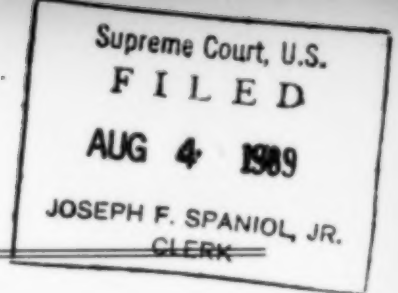
approved, the Florida branch sent the original financing contract to Dearborn which maintained the original contract in Michigan. The FMCC branch prepared a report, and sent the amount owed for Florida documentary stamps to the state on a monthly basis. The FMCC branch retained the car title, a copy of the financing contract, and background financial information on the consumer. Absent some direct communication by the purchaser or a problem with delinquency, the branch would not hear from or see the consumer.

The consumer received a payment coupon book. Payment was made to a FMCC in care of a Florida financial institution which handled the money in accordance with FMCC/Dearborn instruction. A consumer could also make walk-in payments directly at a FMCC branch. However, the branch

11a.

had no control over these funds. Reports of payments were sent to Dearborn by the payment center. Dearborn then provided the branch with updated computer information on the account by account number and amount. When a zero dollar balance was achieved, the loan was satisfied, and the branch sent the Department of Motor Vehicles a notice that the lien was satisfied. The car title would be sent to the consumer. If the consumer sold or traded the car prior to paying off the loan, the branch received the final payment and released the title. If the branch received either a final or interim payment by the consumer, those funds were deposited into the same Florida bank account as the "wholesale" payment received from the dealer. Accordingly, the branch could not utilize those funds either.

(4)
No. 88-1847



In The
Supreme Court of the United States
October Term, 1988

FORD MOTOR CREDIT COMPANY,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF APPELLANT OPPOSING
MOTION TO DISMISS OR AFFIRM

JAMES E. TRIBBLE*
DOUGLAS H. STEIN
BLACKWELL, WALKER, FASCELL
& HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880
*Counsel of Record for
Appellant

QUESTIONS PRESENTED

The Department of Revenue, State of Florida ("DOR") charges that Ford Motor Credit Company ("FMCC") and the Amici Curiae have misstated the questions presented. DOR then restates the questions in a manner that emphasizes its contention that the intangibles subjected to Florida's tax have a Florida situs and have never entered into the stream of interstate commerce. In this brief FMCC will demonstrate that DOR's position based on an assumed Florida situs of the intangibles is fallacious, and that FMCC has correctly stated the questions as follows:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a *per se* basis to intangible property taxes.

2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

In addition to presenting reply argument on those questions, FMCC will address the two preliminary issues raised by DOR:

1. Whether FMCC's right of review by direct appeal under 28 U.S.C. §1257 (1982) is preserved by the amendment adopted by Pub.L. 100-352, §§3, 7, 102 Stat. 662 (1988); and

2. Whether FMCC, as a non-domiciliary, has standing to challenge Florida's intangible tax law.

PARTIES

The parties are those named in the caption of this brief. The correct designation of the appellant is Ford Motor Credit Company, without the added "Inc." as erroneously indicated in the Jurisdictional Statement. The correct designation of the appellee is Department of Revenue, State of Florida. The status of FMCC's affiliates and subsidiaries remains the same as stated in the Jurisdictional Statement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
ARGUMENT OF REASONS WHY THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED.....	1
I	
FMCC'S RIGHT OF APPEAL TO THIS COURT WAS PRESERVED BY THE PUBLIC LAW EFFEC- TING THE 1988 AMENDMENT TO 28 U.S.C. §1257	1
II	
DOR'S ARGUMENTS THAT FMCC'S INTANG- IBLES HAD A LEGITIMATE TAXABLE SITUS IN FLORIDA AND NEVER ENTERED THE STREAM OF INTERSTATE COMMERCE LACK MERIT AND DO NOT REFUTE THE EXIS- TENCE OF A SUBSTANTIAL FEDERAL QUES- TION IN THIS CASE.....	3
III	
FMCC, AS A NON-DOMICILIARY FLORIDA TAXPAYER, HAS STANDING TO CHALLENGE FLORIDA'S INTANGIBLE TAX UNDER THE COMMERCE CLAUSE, BASED ON THE POTENTIAL FOR DOUBLE TAXATION AND NON-COMPLIANCE WITH THE INTERNAL CONSISTENCY TEST.....	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

<i>American Ry. Express v. Levee</i> , 263 U.S. 19 (1923).....	3
<i>American Trucking Ass'ns, Inc. v. Scheiner</i> , 483 U.S. ____ 97 L.Ed.2d 226 (1987)	5
<i>Armco Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	4, 5, 6
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984).....	9
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	4
<i>D.H. Holmes Co., Ltd. v. McNamara</i> , 486 U.S. ____ 100 L.Ed.2d 21 (1988).....	5
<i>General Oil Co. v. Crain</i> , 209 U.S. 211 (1908)	4
<i>Goldberg v. Sweet</i> , 488 U.S. ____ (1989)	10
<i>Hammerstein v. Superior Court</i> , 341 U.S. 491 (1951)	2
<i>Handley v. Malden</i> , 232 U.S. 1 (1914).....	6
<i>Michigan-Wis. Pipeline Co. v. Calbert</i> , 347 U.S. 157 (1954)	2
<i>Michelin Tire Corp. v. Wages</i> , 423 U.S. 276 (1976).....	4
<i>Minnesota v. Blasius</i> , 290 U.S. 1 (1933).....	4
<i>Mobil Oil Corp. v. Commissioner of Taxes</i> , 445 U.S. 425 (1980)	7
<i>Nippert v. Richmond</i> , 327 U.S. 416 (1946).....	4, 8
<i>Tyler Pipe Indus., Inc. v. Washington Dep't of Reve- nue</i> , 483 U.S. ____ 97 L.Ed.2d 199 (1987).....	4
<i>United States v. Healy</i> , 376 U.S. 75 (1964)	2

TABLE OF AUTHORITIES - Continued

Page

OTHERS:

§199.112(1), Fla. Stat. (1983).....	7
28 U.S.C. §1257.....	1, 2, 3
28 U.S.C. §1257(2) (1982).....	3
Fla.R.Civ.P. 1.530.....	1
P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 43 (1981)	6
Pub. L. 100-352 §3, 102 Stat. 662 (1988)	1
Pub. L. 100-352 §7, 102 Stat. 662 (1988)	1

**ARGUMENT OF REASONS WHY THE MOTION TO
DISMISS OR AFFIRM SHOULD BE DENIED**

I

**FMCC'S RIGHT OF APPEAL TO THIS
COURT WAS PRESERVED BY THE PUBLIC
LAW EFFECTING THE 1988 AMENDMENT
TO 28 U.S.C. §1257.**

DOR's contention that this Court lacks jurisdiction over this appeal is baseless. The amendment to 28 U.S.C. §1257, which eliminated this Court's jurisdiction to entertain appeals from state court judgments, became effective on September 25, 1988. Pub. L. 100-352 §§3, 7, 102 Stat. 662 (1988). The enactment, however, specifically provides that the amendment does not "affect the right to review or the manner of reviewing the judgment or decree of a court which was *entered* before such effective date." Pub. L. 100-352 102 Stat. 662 (1988) (emphasis added). The judgment of the District Court of Appeals of Florida, First District, hereinafter referred to as the DCA, on review in the instant case was entered on September 13, 1988, 12 days prior to the effective date of the statutory amendment.

DOR argues that because the DCA's decision was not "final" according to Florida law until disposition of FMCC's motion for rehearing on October 12, 1988, the decision was also not "entered" until that date. This contention is meritless. In Florida, whether the judgment of a court is final for appellate purposes, i.e. "rendered," has nothing to do with whether that judgment has been entered. See Fla.R.Civ.P. 1.530. Although the DCA's decision may not have been final on September 13, 1988, it was indeed "entered" on that date.

Supreme Court Rule 11, which dictates the time for taking an appeal in this Court, clearly contemplates that a judgment can be entered yet not meet the "finality" requirement essential to this Court's jurisdiction. For example, Rule 11.1 requires that an appeal to review the

judgment of a state court in a criminal case must be taken within 90 days after "the entry of such judgment." Upon construing the older version of the rule which differed merely by prescribing a 30 rather than 90 day period, this Court in *United States v. Healy*, 376 U.S. 75 (1964), recognized that the filing of a motion for rehearing of a state court judgment does not affect the date upon which that state court judgment is entered. The issue stated by this Court in *Healy* was whether the 30 day period prescribed by former Rule 11 "begins to run from the date of entry of judgment or the denial of the petition for rehearing." *Id.* at 78. This Court ultimately held that the time period began to run from the denial of the petition for rehearing. Thus, although the judgment was not final for purposes of this Court's appellate jurisdiction until the denial of the petition of rehearing, the judgment was "entered" long before it became final.

Had Congress intended that the amendment to 28 U.S.C. §1257 should not affect only those judgments which were "final", rather than "entered", before September 25, 1988, it presumably would have stated so. As the judgment of the DCA was entered 12 days prior to the effective date of the statutory amendment, the amendment has no effect on FMCC's ability to appeal the DCA's decision to this Court.

Equally non-compelling is DOR's argument that FMCC's attempt to invoke the discretionary jurisdiction of the Supreme Court of Florida somehow affected this Court's appeal jurisdiction over the DCA's decision. Although FMCC did attempt to invoke the discretionary jurisdiction of the Supreme Court of Florida, that court declined to accept the case. This Court has consistently recognized that when a higher court declines to exercise its discretionary authority, the judgment of the intermediate court, rather than the order of refusal by the higher court, is the judgment reviewable under 28 U.S.C. §1257. *Michigan-Wis. Pipeline Co. v. Calbert*, 347 U.S. 157, 159-160 (1954); *Hammerstein v. Superior Court*, 341 U.S. 491, 492

(1951); *American Ry. Express v. Levee*, 263 U.S. 19, 20-21 (1923).

In the instant case, it is the judgment of the DCA, and not the order of the Supreme Court of Florida, which is the subject of this Court's appellate jurisdiction. As previously discussed, the DCA's judgment was entered on September 13, 1988, before the effective date of the amendment to 28 U.S.C. §1257. The fact that the Supreme Court of Florida declined to accept jurisdiction over the DCA's judgment after the effective date of the amendment, has no bearing whatsoever on whether this Court is vested with jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2) (1982). This Court properly has jurisdiction over the DCA's decision entered September 13, 1988.

II

DOR'S ARGUMENTS THAT FMCC'S INTANGIBLES HAD A LEGITIMATE TAXABLE SITUS IN FLORIDA AND NEVER ENTERED THE STREAM OF INTERSTATE COMMERCE LACK MERIT AND DO NOT REFUTE THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION IN THIS CASE.

DOR's argument that this case involves no substantial federal question rests mainly on variations of a single recurrent theme regarding "situs" of the intangibles subject to the tax. DOR repeatedly contends that FMCC's intangible property had an "actual business situs", or a "legitimate situs" in Florida alone, that the intangibles never crossed state lines to enter the stream of interstate commerce and that Florida restricted its tax to intangible property "actually located" at all pertinent times within its geographical boundaries. In its motion, DOR asserts that Florida is the "actual" situs of the intangibles, as opposed to "a fictional domiciliary situs". (DOR's motion, pp.17, 39).

Those arguments are fallacious. Although the situs of taxable property can be an important factor in deciding

whether a tax complies with due process, this Court has established that locale is not determinative of a tax dispute arising out of the commerce clause. In *Nippert v. Richmond*, 327 U.S. 416, 423-424 (1946), this Court noted that while every tax affecting interstate commerce has some local aspect, it does not follow that a taxing authority may use "mental gymnastics" to make that local aspect a "fulcrum" for a tax which would discriminate against interstate commerce.

The cases cited by DOR offer no support for the imposition of a "locality" test as suggested by DOR. In each, the property which was the subject of the tax was merely "passing through" the taxing state. *Minnesota v. Blasius*, 290 U.S. 1 (1933); *General Oil Co. v. Crain*, 209 U.S. 211 (1908). It has long been held that even nondiscriminatory property taxes on goods which are merely in transit through a state are invalid. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The issue in both *Minnesota v. Blasius* and *General Oil Co. v. Crain* was whether the goods were in transit, thereby rendering the tax invalid. The issue of whether the tax was discriminatory was neither relevant nor raised. Therefore, those cases have no application here. This Court has long held that a state tax is not "immune from commerce clause scrutiny" simply because it attaches to only local or intrastate activity. Rather, the Court's goal has been "to establish a consistent and rational method of inquiry focusing on the practical effect of a challenged tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981).

DOR's argument that the "internal consistency test" is applicable only in those cases requiring apportionment of business income (DOR's motion, p. 50), is the same argument rejected by this Court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). "Prior to *Armco*, the internal consistency test was applied only in cases involving apportionment of the net income of businesses that more than one State sought to tax." *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. ___, 97 L.Ed.2d 199, 219 (1987)

(J. Scalia, dissenting). In *Armco*, however, the Court promoted the "internal consistency test" to a rule generally applied to any tax which discriminates in violation of the commerce clause:

In [*Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983)], the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.

Armco, 467 U.S. at 644 (emphasis added).

The cases of *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. ___, 97 L.Ed.2d 226, (1987) and *Tyler Pipe*, are other clear and recent examples of this Court's application of the internal consistency test to taxing schemes other than those taxing business income.

In *D.H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. ___, 100 L.Ed.2d 21 (1988) this Court once again recognized that multiple taxation which discriminates against interstate business violates the commerce clause. The Court, however, found that Louisiana's use tax on personal property had no discriminatory effect on interstate commerce because the Louisiana legislature had provided a mechanism which guarded against multiple taxation of the same property:

The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States. . . . Holmes paid no sales tax for the catalogs where they were designed or printed; if it had, it would have been eligible for a credit against the use tax exacted.

D.H. Holmes Co., Ltd. v. McNamara, 100 L.Ed.2d at 28.

Implicit in the Court's holding is that if Louisiana had not provided a credit against taxes imposed by other states, Louisiana's tax would violate the commerce clause. In *D.H. Holmes*, the Court also discounted the importance of whether the catalogs were still in interstate commerce

once delivered to Louisiana mailboxes, noting that the factor was "largely irrelevant" for commerce clause purposes. *Id.*, 100 L.Ed. at 27. In the instant case, Florida's intangible property tax is imposed on property which, by mandate of the internal consistency test, is presumed also to be taxed by Michigan. Florida has made no provision for a credit which would fairly apportion its tax. Florida's taxing scheme lacks all the qualities upon which Louisiana's tax was held to be valid. FMCC's intangible property is fully taxed by Florida despite the irrebuttable presumption that it is also taxed by Michigan. Florida's taxing scheme is not fairly apportioned and, therefore, discriminates against interstate commerce.

DOR's argument that a "locality" test should apply rather than the "internal consistency test" is not only contrary to the most recent pronouncements of this Court, but also is logically incapable of being applied to the instant case. DOR's argument ignores the long established principle that intangible property, by its incorporeal nature, has no physical situs. See *Handley v. Malden*, 232 U.S. 1, 11 (1914).

Because intangible property has no real situs for taxing purposes, "intangibles generally are reached by the tax gatherers through the assertion of the power of the taxing state over the person of those who have some legal interest in the intangibles." P. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* 43 (1981). Thus, when a person with an interest in intangible property crosses state lines, the basis for the authority to tax has crossed state lines. "A state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs within the state." *Armco*, 467 U.S. at 545. Yet Florida's taxing scheme does just that: In violation of the internal consistency test, it exposes the taxpayer to multiple taxes on intangible property arising from interstate transactions, while insuring that there will be only a single tax on intangible property arising from purely intra-Florida transactions. Both the applicability and the

violation of the internal consistency test could hardly be clearer.

It is only through the contrived provisions of the Florida statute under review that the DOR can claim that the intangible assets are "located" within Florida's geographical boundaries. Only by a legal fiction can any locale be assigned to an intangible asset.

In its effort to establish a "business situs" which does not cross state lines, DOR relies on Florida Statute §199.112 (1983), which conveniently provided that all intangible property "issued in connection with the sale, leasing, or servicing of real or personal property in this state shall be deemed to have a Florida business situs and shall thus be subject to taxation under this chapter." (DOR's motion, p. 26). In fact, however, the statutory criteria are plainly based on transactions that are inherently interstate in character. The tax is imposed on obligations arising out of the sale, leasing or servicing of real or personal property in the state, regardless of where the obligations are kept, approved or paid. Additionally, Florida law provides that sales of tangible personal property are deemed to be Florida sales for purposes of the intangible property tax if the tangible property is delivered or shipped to a purchaser in Florida, regardless of f.o.b. point or conditions of sale. §199.112(1), Fla. Stat. (1983). This provision, by its very nature, can apply only to sales which occur in interstate commerce.

According to DOR's theory, Florida can, by the device of contrived legal definition, transform an inherently interstate transaction into a purely local taxable event – the ownership of Florida-based intangible property. To permit such a contrivance would thwart the intent and purpose of the commerce clause as interpreted by this Court. This Court has expressly rejected essentially the same argument being made by DOR. In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 445 (1980), the Court held that a state-created fictional business situs

of intangible property does not control the issue of taxability.

If one peels back the artificial veneer of a Florida business situs, the interstate nature of a non-domiciliary's ownership of intangible property becomes apparent. Florida's taxing scheme automatically provides that intangible assets have a Florida situs if those assets arise from property sold or leased in Florida, or if the tangible property from which they are derived is shipped to Florida. This rule applies regardless of where documents creating the intangible assets are kept, approved, or paid, and regardless of the point of transfer of title of the underlying tangible property. Based on nothing more than "an act of mental gymnastics," the Florida scheme creates a fixed legal situs for intangible property as a single "fulcrum" for the tax, thereby subjecting the property to discriminatory multiple taxation. *See Nippert*, 327 U.S. at 423. Where, as here, Florida deems the legal existence of an intangible asset to be solely in Florida, it is inevitable that Florida will tax that intangible asset without regard to any tax imposed by the domiciliary state. There is no basis in the Florida taxing scheme for doing otherwise.

DOR does not even attempt to argue that Florida's taxing scheme does not discriminate against interstate commerce by permitting multi-state taxation of the full value of the same intangible asset. Rather, DOR contends in effect that the courts must close their eyes to that discrimination because of a legal fiction that the intangible asset does not cross state lines.

III

FMCC, AS A NON-DOMICILIARY FLORIDA TAXPAYER, HAS STANDING TO CHALLENGE FLORIDA'S INTANGIBLE TAX UNDER THE COMMERCE CLAUSE, BASED ON THE POTENTIAL FOR DOUBLE TAXATION AND NON-COMPLIANCE WITH THE INTERNAL CONSISTENCY TEST.

DOR's argument that FMCC has no standing to challenge those portions of Florida's tax which pertain to the taxation of a Florida domiciliary corporation is irrelevant as FMCC is not challenging any tax imposed on a Florida domiciliary. It is, however, the very existence of those portions of the intangible tax which render the taxing scheme discriminatory and, therefore, unconstitutional. Thus it is necessary to examine those portions of Florida's tax for compliance with the internal consistency test, which invalidates any taxing scheme which, if adopted by all other states, would result in discriminatory taxation. Since it is Florida's intangible taxing scheme taken as a whole which discriminates against interstate business, FMCC has standing to challenge the tax. As best stated by this Court:

[T]he wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. *The wholesalers plainly have standing to challenge the tax in this Court.*

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267 (1984) (footnote omitted, emphasis added).

DOR further argues that this Court should refrain from reviewing the constitutionality of the Florida statute because double taxation has not been established in the record and is only a "hypothetical" possibility. (DOR's motion, p. 55). This argument, however, ignores the very premise of the internal consistency test. As recently reaffirmed by this Court, it is the *possibility* of discriminatory

double taxation which renders a tax violative of the commerce clause:

To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.

Goldberg v. Sweet, 488 U.S. ___, 102 L.Ed.2d 607, 617 (1989) (citation omitted). FMCC certainly has standing to present to this Court the controversy at bar.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion to Dismiss or Affirm and note probable jurisdiction of this appeal.

Respectfully submitted,

JAMES E. TRIBBLE*

DOUGLAS H. STEIN

BLACKWELL, WALKER, FASCELL

& HOEHL

2400 AmeriFirst Building

One Southeast Third Avenue

Miami, Florida 33131

Telephone: (305) 358-8880

*Counsel of Record for
Appellant

(3)
No. 88-1847

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

FORD MOTOR CREDIT COMPANY

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIRST DISTRICT

JURISDICTIONAL BRIEF OF CATERPILLAR INC.,
CLARK EQUIPMENT COMPANY, CLARK EQUIP-
MENT CREDIT CORPORATION, CSX TRANSPORTA-
TION, INC., GENERAL MOTORS ACCEPTANCE
CORPORATION, and GENERAL MOTORS CORPORA-
TION Participating As Amici Curiae in Support of
Appellant

KENNETH R. HART*
ROBERT A. PIERCE
STEVEN P. SEYMOE of
AUSLEY, McMULLEN, McGEHEE
CAROTHERS & PROCTOR
Post Office Box 391
Tallahassee, Florida 32302
904/224-9115
*Counsel of Record for
Amici Curiae

QUESTIONS PRESENTED

Appellant, Ford Motor Credit Company, has appealed a decision of the District Court of Appeal of Florida, First District, which held that Florida's intangible property tax does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. Under its taxing scheme Florida taxes nondomiciled taxpayers on that portion of their intangibles which are generated from Florida sales or from sales which result in property being delivered to a purchaser in Florida. Florida's taxing scheme also taxes all of the intangibles owned by a taxpayer domiciled in Florida. If other states adopted Florida's taxing scheme, there would be multiple taxation of the intangible assets of those taxpayers operating in interstate commerce. The resulting discrimination against interstate commerce creates a constitutional flaw in Florida's taxing scheme.

Appellant has raised the following substantial federal questions:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a per se basis to intangible property taxes.
2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSENT OF THE PARTIES	1
INTERESTS OF AMICI CURIAE	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	5
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES:

<i>American Trucking Assn., Inc. v. Scheiner</i> , 483 U.S. 266 (1987)	11, 12
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	12
<i>Boston Stock Exch. v. State Tax Comm'n.</i> , 429 U.S. 318 (1977)	14
<i>Clark Equipment Credit Corp. v. Dept. of Revenue, State of Florida</i> , Case No. 86-794 (Fla. 2d Cir. Ct.)	2
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	7
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	9, 10, 12, 13, 14
<i>Container Corporation of America v. Franchise Tax Board</i> , 463 U.S. 159 (1983)	9, 10, 11, 12, 14
<i>CSX Transportation, Inc. v. Department of Revenue, State of Florida</i> , Case No. 87-137 (Fla. 2d Cir. Ct.)	2
<i>CSX Transportation, Inc. v. Department of Revenue, State of Florida</i> , Case No. TCA 88-40132 (N.D. Fla.)	3
<i>Curry v. McCanless</i> , 307 U.S. 357 (1939)	10, 13
<i>D.H. Holmes Co., Ltd. v. McNamara</i> , ___ U.S. ___, 108 S.Ct. 1619 (1988)	12
<i>Florida Steel Corp. v. Dickinson</i> , 328 So.2d 418 (Fla. 1976)	7
<i>Ford Motor Credit Co. v. Department of Revenue, State of Florida</i> , 537 So.2d 1011 (Fla. 1st DCA 1988), review denied, ___ So.2d ___ (Fla., Feb. 22, 1989)	6, 7, 10

TABLE OF AUTHORITIES - Continued

	Page
<i>General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida, Case No. 86-2526 (Fla. 2d Cir. Ct.)</i>	3
<i>Goldberg v. Sweet, ___ U.S. ___, 109 S.Ct. 582 (1989)</i> .	12, 13
<i>Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)</i>	10, 13
<i>Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980)</i>	10, 11
<i>Pullman's Palace Car v. Commonwealth of Pa., 141 U.S. 18 (1891)</i>	11
<i>State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942)</i>	13
<i>Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. 232 (1987)</i>	11, 12
OTHER:	
Fla. Stat. § 199.112(1) (1983)	4, 5, 9
Fla. Stat. § 199.175 (1987).....	5
Fla. L. 85-342 (1985)	5
U.S. Const. art. I, § 8, cl. 3	4

CONSENT OF THE PARTIES

Both Ford Motor Credit Company, Appellant and the State of Florida, Department of Revenue, Appellee, have consented to Amici Curiae participating in these proceedings. Their consents have been filed with this Court.

INTERESTS OF AMICI CURIAE

Caterpillar Inc. ("Caterpillar") is a Delaware corporation with its principal place of business in Peoria, Illinois. It is a multinational company which is engaged in the design, manufacturing and sale of earth moving, construction, and material handling equipment. Caterpillar engages in these business activities in numerous countries and states, including Florida. In the course of such activities, Caterpillar sells its equipment on open account, and thereby creates intangible assets used in interstate commerce. As a result, Florida has subjected Caterpillar to its tax on intangibles. Caterpillar is currently protesting the imposition of this tax in an administrative proceeding before the Florida Department of Revenue. The issues before this Court have been raised by Caterpillar in its administrative proceeding, and the outcome of that proceeding will be directly affected by the outcome of this appeal.

Clark Equipment Company ("Clark") is a Delaware corporation with its principal place of business in South Bend, Indiana. It is a multinational company engaged in the design, manufacture and sale of equipment to move materials, systems to transfer power, and products for industrial application. Clark engages in these activities in

numerous foreign countries and states, including Florida. In the course of such activities, Clark finances certain purchases and therefore creates various intangible assets used in interstate commerce. As a result, Florida has subjected Clark to its tax on intangibles, and its tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Clark Equipment Credit Corporation ("Clark Credit") is a Michigan corporation with its principal place of business in Buchanan, Michigan. It is engaged in the financing of wholesale and retail sales of equipment in numerous states, including Florida. These activities result in the creation of various types of intangible assets used in interstate commerce. Accordingly, Florida has subjected Clark Credit to its tax on intangibles. Clark Credit is currently litigating the imposition of Florida's intangible property tax in *Clark Equipment Credit Corp. v. Dept. of Revenue, State of Florida*, Case No. 86-794 (Fla. 2d Cir. Ct.), and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect Clark Credit's pending litigation.

CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business in Baltimore, Maryland. It is a common carrier by rail and operates a railroad system in 19 states, including Florida, and the District of Columbia, and Canada. As a result of such activities, intangible assets are created which are used in interstate commerce. Accordingly, Florida has subjected CSXT to its tax on intangibles. CSXT has disputed the application of Florida's intangible tax to its intangibles and is currently litigating certain aspects of Florida's intangible property tax in *CSX Transportation, Inc. v.*

Department of Revenue, State of Florida, Case No. 87-137 (Fla. 2d Cir. Ct.) and *CSX Transportation, Inc. v. Department of Revenue, State of Florida*, Case No. TCA 88-40132 (N.D. Fla.). The outcome of this appeal will affect CSXT's pending litigation.

General Motors Acceptance Corporation ("GMAC"), a wholly owned subsidiary of General Motors Corporation, is a New York corporation with its principal place of business in Detroit, Michigan. It is engaged in the financing of wholesale and retail sales of vehicles manufactured by General Motors Corporation in numerous states, including Florida. These activities result in the creation of intangible assets used in interstate commerce. Accordingly, Florida has subjected GMAC to its tax on intangibles. GMAC is currently litigating the imposition of this tax in *General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida*, Case No. 86-2526 (Fla. 2d Cir. Ct.) and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect GMAC's pending litigation.

General Motors Corporation ("GM") is a Delaware corporation which maintains its principal place of business in Detroit, Michigan. It is a multinational company engaged in the design, manufacturing, and sale of vehicles. GM engages in these business activities in numerous countries and states, including Florida. In the course of such activities, GM engages in various types of financing activities. These business activities result in the creation of intangible assets used in interstate commerce. As a result, Florida has subjected GM to its tax on intangibles, and its tax liability to Florida will be directly affected by the outcome of this appeal.

Amici are extensively engaged in interstate commerce and are subject to a variety of taxes imposed by numerous states and localities. In addition to this particular appeal, Amici have a strong interest in protecting interstate commerce from discriminatory and unduly burdensome state and local taxation. Specifically, Amici are subject to numerous taxes based upon their intangible property and are concerned that their intangible property will be subjected to multiple tax burdens. The Court's disposition of this appeal will not only directly affect the pending actions of Amici, but will also affect the future development of state and local tax practices in a manner which will have a far-reaching, long-term effect on activities engaged in by Amici.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provision of the Constitution of the United States of America is:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

U.S. Const. art. I, § 8, cl. 3.

The relevant Florida statute is Fla. Stat. § 199.112(1) (1983), which provided:

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision

shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.¹

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The principal issue before this Court is whether Florida's intangible tax system violates the Commerce Clause of the United States Constitution. The answer to this question involves a determination of whether the Commerce Clause applies to intangible assets created and used in interstate commerce and whether the internal consistency test used by this Court to resolve Commerce Clause challenges applies to intangible personal property taxes.

The Appellant, Ford Motor Credit Company ("Ford Motor Credit"), has filed its Jurisdictional Statement in this appeal. This brief is in support of Ford Motor Credit's position and should be considered in conjunction with Appellant's Jurisdictional Statement which is

¹ Fla. L. 85-342 (1985) repealed § 199.112, Fla. Stat. (1983), but created § 199.175, Fla. Stat. (1987), which incorporated in, a substantially similar form the provisions of former § 199.112.

adopted by Amici Curiae. In order to avoid unnecessary repetition, Amici have not duplicated certain arguments contained in Appellant's Jurisdictional Statement.

Florida's First District Court of Appeal ("DCA") held that the internal consistency test used by this Court to analyze Commerce Clause challenges does not apply to Florida's intangible tax. *Ford Motor Credit Co. v. Department of Revenue, State of Florida*, 537 So.2d 1011, 1013 (Fla. 1st DCA 1988), *review denied*, ___ So.2d ___ (Fla., Feb. 22, 1989). This holding conflicts with applicable decisions of this Court.

If allowed to stand, the DCA's decision, and similar decisions by other state courts, will substantially curtail this Court's efforts to establish a consistent and rational analysis (i.e., the internal consistency test) to determine whether a state tax impermissibly burdens or discriminates against interstate commerce. A refusal by states to utilize the internal consistency test as part of their analysis in resolving Commerce Clause challenges will have a material and adverse impact on taxpayers engaged in interstate commerce and provide different standards for evaluating the constitutionality of different types of state taxes. The present need of the various states for revenue, the evolving complexity of their taxing schemes, and the extent of modern day interstate commerce will heighten the severity of such an adverse impact.

The DCA, while acknowledging discrimination against interstate commerce is prohibited, refused to apply the internal consistency test to the tax in question and, as a result, found that Florida's taxing scheme did not violate the Commerce Clause. *Id.* at 1013. Although

the DCA stated that its refusal to apply the internal consistency test was based on a distinction between property taxes and excise and income taxes, its holding is based, in part, upon a finding that interstate commerce is not involved. The DCA found that "[t]he contested intangible tax in the present case is not integrally related to interstate commerce" *Id.* at 1012. In reaching this result, the DCA failed to address the obvious differences between the ad valorem taxation of intangible assets which arise from the financing of sales made in interstate commerce and the ad valorem taxation of property which is physically located in a particular state.²

Florida's intangible tax at issue is imposed in three separate circumstances: (1) when the owner of the intangible has a Florida domicile;³ (2) when the sale which gives rise to the intangible is a Florida sale; and (3) when the sale which gives rise to the intangible results in a delivery of property to Florida. In this latter circumstance, the Florida scheme establishes a tax situs through creating a presumption of a Florida sale regardless of where the sale

² *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), rejected the argument that a state could focus solely upon a single intrastate activity and evade the Commerce Clause's application. 453 U.S. at 617. Today, the Commerce Clause may be implicated if the local activity involves goods which may eventually enter into interstate commerce.

³ Although Florida's statute, Section 199.112(1) (1983), Florida Statutes, does not appear on its face to directly address the issue of Florida's taxation of all intangibles owned by Florida domiciled taxpayers, Florida does tax such intangibles. Furthermore, Florida's taxation of such intangibles is not in dispute. *Ford Motor Credit*, 537 So.2d at 1012, citing *Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976).

actually occurs. The imposition of the tax is triggered by any one of these circumstances and is applied to the outstanding balance of such intangibles as of January 1 of each year.

If other states adopted Florida's taxing scheme, non-Florida domiciled taxpayers engaged in interstate commerce in Florida would be subject to taxation on their intangibles in their state of domicile, in the state in which the sale generating the intangible actually occurs, and in the state where the property is delivered. Because of this multiple taxation of the same intangibles, taxpayers which only engage in intrastate commerce will be provided an economic advantage over those engaged in interstate commerce.

A review of Florida's taxing statute demonstrates that the intangibles generated from sales by non-domiciled taxpayers are involved in interstate commerce. By utilizing a tax scheme which would establish a tax situs for intangibles in multiple states, Florida acknowledges that such intangibles are not discrete assets which are physically located in a particular state but are rather a part of the flow of interstate commerce. Florida's statute determines the tax situs of intangibles owned by non-domiciled taxpayers by reference to the original location of the activities from which the intangibles arise, such as the sale, leasing, or servicing of property. The usual ad valorem property tax system, unlike Florida's tax scheme, makes no distinction as to where the property is created, but focuses on the location of the property at the date such an annual ad valorem tax is imposed. Florida taxes intangibles regardless of where they are located on the annual assessment date.

Furthermore, Florida specifically excludes certain of the actual characteristics of the intangibles from the determination of the location of the business situs of the intangibles, i.e., "... where they are kept, approved as to creation, or paid." Fla. Stat. § 199.112(1) (1983). By taking this approach, Florida seeks to make the domicile of the owner of the intangible, the place of sale, or the location of the purchaser at the time of delivery of property the only relevant factors in determining the annual tax situs of any resulting intangible. This approach demonstrates that these intangibles are a part of interstate activities and that to establish a tax situs in Florida, a number of characteristics pertinent to determining the actual location of an intangible must be eliminated from consideration in order to achieve the result desired by Florida.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court found that interstate commerce was not immune from state taxation. A four-prong test was developed which required that an activity subject to tax have a substantial nexus to the taxing state, that the tax be fairly apportioned, that the tax not discriminate against interstate commerce, and that the tax be fairly related to the services provided. *Id.* at 279.

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court, applying *Complete Auto* to California's corporate unitary taxing scheme, articulated the "internal consistency" inquiry requiring that a state's taxing scheme be "fair." By fair, the Court stated "the formula must be such that if applied by every other jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169.

In support of its conclusion that the internal consistency test does not apply to property taxes, the DCA cited cases decided before *Container Corporation*, the progenitor of the internal consistency test. *Ford Motor Credit*, 537 So.2d at 1013. Although these pre-*Container* cases do contain certain distinctions between property taxation and excise and income taxation, these distinctions were not made in a context which would support the proposition that the internal consistency test is not part of modern day Commerce Clause analysis.⁴

In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443-46 (1980), the contention was rejected that there was something talismanic about the taxation of intangibles that immunized dividends from the application of the apportionment prong of *Complete Auto*. Noting that the theories of taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, the Court stated that the theory of taxing property at a single situs no longer applies when the taxpayer's activities involve relations with more than one state. *Id.* at 445, citing *Curry v. McCanless*, 307 U.S. 357 (1939).

Contrary to the DCA's holding, the principle to be gleaned from *Mobil Oil* is not that differences continue to exist between property and other forms of taxation, but rather that, absent exceptional circumstances, taxation of

⁴ A Commerce Clause analysis is required for evaluating Florida's intangible property tax. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), where the Commerce Clause analysis requirements of *Complete Auto* were applied in evaluating the constitutionality of an ad valorem taxing system.

property involved in interstate commerce is to be by apportionment, rather than by allocation to a single situs.

In *Pullman's Palace Car v. Commonwealth of Pa.*, 141 U.S. 18 (1891), this Court characterized a tax on the capital of a corporation as a tax on the corporate property within the taxing state. The Court then proceeded to uphold the tax on a nondomiciled railroad because the tax was fairly apportioned. *Pullman* stands for the proposition that intangible taxes such as a tax on a corporation's capital stock must be apportioned if the intangible is a part of interstate commerce.

In both *Mobil* and *Pullman's Palace*, this Court was faced with the question of the constitutionality of the imposition of a tax on instrumentalities of interstate commerce prior to *Container Corporation*. Any distinctions in these cases between property and income taxes should have no impact on this Court's current application of the Commerce Clause or the internal consistency test to property which is part of interstate commerce.

The DCA also cited dissenting opinions by Justice O'Connor and Justice Scalia in *American Trucking Assn., Inc. v. Scheiner*, 483 U.S. 266 (1987), and Justice Scalia in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), in support of its conclusion that there was no suggestion in this Court's internal consistency cases that this Court would be inclined to set aside a long-standing distinction between property taxes and excise or income taxes or apply the internal consistency test in an intangible property tax context. These dissenting opinions, however, object to this Court's use of an

internal consistency test. Contrary to the DCA's conclusion, these dissenting opinions indicate that the majority of this Court would not follow pre-*Container* cases in analyzing Commerce Clause challenges to state taxes.

Since this Court articulated the internal consistency test, it has consistently held that the internal consistency test is an integral part of any Commerce Clause analysis under *Complete Auto*. See *Goldberg v. Sweet*, ___ U.S. ___, 109 S.Ct. 582 (1989); *D.H. Holmes Co., Ltd. v. McNamara*, ___ U.S. ___, 108 S.Ct. 1619 (1988); *American Trucking Assn., Inc. v. Scheiner*; *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*; *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). This Court has never indicated an intention to restrict the internal consistency test to "nonproperty" taxes. There is no basis for the DCA's conclusion that internal consistency does not apply to a Commerce Clause analysis of an intangible tax such as Florida's.

The need to review the internal consistency of a tax scheme is as applicable to Florida's intangible tax as it was to West Virginia's gross receipts tax in *Armco, Inc. v. Hardesty*. A gross receipts tax such as the one addressed in *Armco* has no greater burden on interstate commerce than does a tax on the intangibles which represent those gross receipts. The economic reality of Florida's tax is that it does not impose a tax on property located exclusively in Florida, but on gross receipts which are financed and which are from Florida sales made by nondomiciled taxpayers or from all sales made by domiciled taxpayers. This Court has stated that the analysis of a state tax should be based on the economic substances of the tax. *Complete Auto*, 430 U.S. at 288. Even more egregious than the West Virginia tax, the Florida tax is an annual, value

based tax where the intangibles derived from a single transaction will be taxed repeatedly until paid.

The DCA erroneously relied on a due process analysis and not on a Commerce Clause analysis in reaching its conclusion that the taxing scheme does not discriminate against interstate commerce. In support of its due process analysis, the DCA cited to *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCannless*, 307 U.S. 357 (1939). While admitting that those cases involve only due process challenges, the DCA found little reason to doubt their application since a tax which will "... satisfy the due process clause generally will satisfy the commerce clause." 537 So.2d at 1012.

Contrary to the DCA's holding, the Commerce and the Due Process Clauses are not synonymous and a tax which satisfies Due Process Clause does not per se satisfy all the elements of the Commerce Clause. Specifically, the apportionment and discrimination prongs of *Complete Auto* must also be satisfied. See *Goldberg v. Sweet*, 109 S.Ct. at 588. Moreover, *Curry* and *Aldrich* involve, at most, nexus and benefit issues, the first and fourth prongs of the *Complete Auto* test. To the extent those cases involve apportionment and discriminatory issues, they are superseded by this Court's decision in *Complete Auto*.

This Court noted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), that, prior to *Complete Auto*, the theory of property taxation was through allocation of the full value to the domicile of the owner, but that theory is no longer used and property involved in interstate commerce is now to be taxed according to the rule

of fair apportionment and nondiscrimination. 441 U.S. at 442.

The DCA's decision is in conflict with existing decisions of this Court by failing to apply *Complete Auto, Container Corporation*, and their progeny. Florida has carved out an exception to the Commerce Clause in violation of this Court's previous holdings. This raises substantial federal questions requiring this Court to resolve, once again, " . . . the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977).

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

KENNETH R. HART
ROBERT A. PIERCE AND
STEVEN P. SEYMOE OF
AUSLEY, McMULLEN, McGEHEE,
CAROTHERS & PROCTOR
Post Office Box 391
Tallahassee, Florida 32302
904/224-9115
Attorneys for Amici Curiae

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No. 88-1847

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

JOINT APPENDIX

MARK. L. EVANS
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel of Record for Appellant

H. BARTOW FARR III
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel of Record for Appellee

APPEAL DOCKETED MAY 12, 1989
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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Pre-Hearing Stipulation	2
Exhibit 7 to Pre-Hearing Stipulation	8
Petitioner's Interrogatories to Respondent With Re- spondent's Initial Response	13
Supplemental Response to Petitioner's Interrogatories..	17

* * * *

The following items have been omitted from this Joint Appendix because they appear on the indicated pages of the Appendix to the Jurisdictional Statement:

Opinion of the District Court of Appeal of Florida, First District	App. 1
Final Order of the Florida Department of Revenue	App. 6

RELEVANT DOCKET ENTRIES

- April 18, 1985 —Petition for Administrative Hearing, with Exhibits, filed with the Department of Revenue, State of Florida
- May 8, 1985 —Answer of the Department of Revenue received by hearing officer
- September 2, 1986 —Pre-Hearing Stipulation with Exhibits 1-8 received by hearing officer
- December 15, 1986 —Supplemental Response to Petitioner's Interrogatories filed with hearing officer
- March 24, 1987 —Recommended order of division of administrative hearings
- November 19, 1987 —Final order of Department of Revenue rendered
- December 8, 1987 —Notice of Appeal to District Court of Appeal of Florida, First District filed
- September 13, 1988 —Opinion of District Court of Appeal of Florida, First District filed, affirming final order of Department of Revenue
- September 27, 1988 —Motion for Rehearing filed with District Court of Appeal of Florida, First District
- October 12, 1988 —Motion for Rehearing denied by District Court of Appeal of Florida, First District
- October 27, 1988 —Notice invoking discretionary jurisdiction of the Supreme Court of Florida filed with District Court of Appeal of Florida, First District
- February 22, 1989 —Order of Supreme Court of Florida denying petition for discretionary review
- April 5, 1989 —Notice of Appeal to U.S. Supreme Court filed with District Court of Appeal of Florida, First District

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

PRE-HEARING STIPULATION

Petitioner Ford Motor Credit Company ("FMCC") and Respondent Department of Revenue ("Department"), through their respective counsel, hereby enter into the following pre-hearing stipulation.

I. NATURE OF THE ACTION

FMCC has invoked the Florida Administrative Procedure Act to challenge action by the Department to adjust FMCC's intangible tax return filed for tax years 1980 through 1982, inclusive. The Department seeks to collect additional tax plus interest and penalties. The Department contends FMCC owes a total amount of \$1,226,045 (as tax) plus \$486,369 (interest as of 7/20/84) and \$543,968 (as a non-fraud penalty) for the three years. A copy of the Department's Revised Notice of intent to Make Audit Changes and Explanation of Items is attached as Exhibit 1. FMCC contends no tax is due because: 1) Florida Statute § 199.112 is unconstitutional; 2) there is an insufficient nexus to permit the imposition of the tax, and 3) even if the tax can be imposed, interest and penalties should not be imposed.

II. BASIS OF JURISDICTION

FMCC filed a timely petition for a formal proceeding pursuant to Florida Statute § 72.011, Florida Statute, Ch. 120, and Florida Administrative Code, Ch. 12-6.

III. PLEADINGS RAISING ISSUES

On April 18, 1985, the Department of Revenue, Office of Agency Clerk received FMCC's petition for formal proceeding. On May 8, 1985, Respondent Department served its Answer, which relies in part on its Notice of Decision, dated October 8, 1984. The Notice of Decision is attached as Exhibit 2.

IV. PENDING MATTERS

Ford seeks answers to certain interrogatories which are the subject of a motion. The Department opposes that discovery. There is also an issue relating to the jurisdiction of an administrative hearing officer to consider this matter in light of the decision in *Florida Export Tobacco Co. v. Department of Revenue*, No. AY-145, Slip. Op. (Fla. 1st DCA, Sept. 30, 1985), *pet. for reh. en banc pending*.

V. CONCISE STATEMENT OF STIPULATED FACTS

The parties agree and stipulate to the following facts.

1. FMCC is a corporation organized and existing under Delaware law. FMCC maintains its principal place of business in Dearborn, Michigan. FMCC is a wholly owned subsidiary of Ford Motor Company.

2. FMCC qualified and is authorized to do business in the State of Florida pursuant to the foreign corporation provisions of Chapter 607, *Fla. Stat.*, and has continuously maintained a registered office and agent in this state during the audit years at issue.

3. During the tax years 1980-1982, inclusive, FMCC and Ford filed corporate tax returns in Florida and paid the taxes due thereon under the Florida Income Tax Code; FMCC maintained 7 to 8 branch offices and employed approximately 200 people in Florida; and Ford had contractual relationships with approximately 130 to 150 authorized Ford dealers in Florida. A copy of a representative agreement between Ford and the dealers is Exhibit 3 to this Stipulation.

4. FMCC's principal business is financing the whole-sale and retail sales of vehicles manufactured by Ford Motor Company. During the audit period FMCC provided financing for the purchase of vehicles as authorized by Ford dealers from Ford Motor Company. FMCC also: provided financing for the purchase of automobiles by the public from the dealers; and engaged in commercial, industrial and real estate financing, consumer loan financing, and leasing company financing in the State of Florida as well as other states. Attached as Composite Exhibit 4 are sample documents utilized by FMCC in the above financing.

5. The majority of the intangibles in question are accounts receivables held by FMCC and owned [sic] by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the State of Florida.

6. FMCC is the holder of security agreements executed by thousands of Florida debtors. These security agreements gave FMCC a lien on tangible personal property located in the State of Florida. The Florida Secretary of State's Office was utilized by FMCC during the assessment period to perfect and protect its liens created under these security agreements with Florida debtors by the filing of U.C.C. financing statements. None of the original notes are stored in Florida.

7. During the assessment period, FMCC utilized or could have utilized the Florida Courts to recover sums

due by Florida debtors on delinquent accounts receivable. In addition, FMCC utilizes the Florida Department of Highway Safety and Motor Vehicles to perfect its liens on motor vehicles pursuant to Ch. 319, Fla. Stat.

8. In 1983, the Department conducted an audit of the FMCC intangible tax returns for tax years 1980 through 1982, inclusive. On June 3, 1983, the Department proposed an assessment of tax, penalty and interest in the total amount of \$2,560,379.00. See Exhibit 5. FMCC filed a timely protest.

9. On October 8, 1984, the Department issued a Notice of Decision. See Exhibit 2. On December 12, 1984, the Department acknowledged receipt of FMCC's timely November 8, 1984 Petition for Reconsideration. On February 18, 1985, the Department issued a Notice of Reconsideration. See Exhibit 6.

10. FMCC elected to file a Petition for Formal Proceedings, which was received on April 8, 1985.

11. On the basis of the revised audit report, the Department of Revenue imposed the intangible tax on FMCC for the tax years 1980 through 1982, inclusive, in the following categories, and in the taxable amounts listed as follows:

[Table omitted in printing. It is reproduced in the Appendix to the Jurisdictional Statement at page App. 10.]

12. At the time it filed its petition for a formal hearing FMCC agreed to and paid the 1 mill tax, but no interest or penalty, on the following amounts. The taxability of these items is no longer in dispute, only penalty and interest.

	1980	1981	1982
(8) Ford Rent-A-Car Receivables	27,825,283	26,179,377	20,832,896
(12) CIR Receivables	23,243,257	27,387,938	24,222,621

13. Capital Loan Receivables (item 5 of paragraph 11) reflect amounts of money owed by Ford dealers to FMCC. The obligation arises from loans made to Ford dealers located in Florida to expand showroom or other facilities and for working capital.

14. The items listed as (10) Accounts Receivable—Customers and Others and (11) Accounts Receivables—Affiliates in paragraph 11 reflect only the amount of accrued interest to which FMCC is entitled on notes from non-affiliates and affiliates, respectively, from the last settlement date prior to year end until the end of each respective year. The principal amounts owed on these notes, which are not secured by realty, are included in other categories. The Department does not assess a tax for similar interest when the amount owed is secured by realty.

15. Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7.

16. The Department of Revenue has imposed penalties in the amount of \$543,968 composed of \$330,051 as the 25% delinquent penalty imposed pursuant to Fla. Stat. § 199.052(9)(a) (1983), and \$15,886 as the 15% undervalued Property penalty imposed pursuant to § 199.052(9)(d) (1983), F.S. The Department offered abatement of the 15% omission penalty (\$198,031) imposed pursuant to Fla. Stat. § 199.052(9)(c) (1983). The closing agreement required pursuant to Fla. Stat. § 213.21 reflecting this reduction of penalty was not signed by petitioner.

17. FMCC's intangible tax returns have been audited on prior occasions. The manner of reporting was identical to the manner in which FMCC reported its intangibles for tax years 1980 through 1982. The 1973-1975 and the 1976-1978 audits were "no change" audits. FMCC's method of reporting receivables generated from Florida sales was challenged by the Department of Revenue.

nue. The challenge was dropped because the Department of Revenue did not have the statutory authority to assess sales of tangible personal property with an f.o.b. point other than Florida. Chapter 77-43, Laws of Florida amended § 199.112, Fla. Stat. to allow tangible personal property regardless of the f.o.b. point of sale. This amendment applied to the January 1, 1978 taxable year. There was a 1978-1980 "no change" audit.

18. Ford Motor Company has filed refund claims for certain categories for the tax year 1981 and 1982. Ford Motor Company claims that it inadvertently paid intangible tax on accounts receivable owned by FMCC. As presented in the Notice of Decision, no refund will be made as it will be handled as a credit against taxes due by Ford Motor Company.

19. While not an announced policy, the Department of Revenue drafted and utilized proposed rules relating to compromising penalties. These rules are not final. Attached as Exhibit 8 are the proposed rules. A copy of these rules was provided to Petitioner by letter dated July 28, 1986. In addition, while not an announced policy the Department of Revenue utilized guidelines established by the Internal Revenue Service and federal court for compromising penalties.

LINDA LETTERA
Assistant Attorney General
J.C. O'STEEN
Assistant Attorney General
Department of Legal Affairs
The Capitol—Tax Section
Tallahassee, Florida 32399-1050
(904) 487-2142
Counsels for Respondent

MARTIN J. KURZER, ESQUIRE
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880
Counsel for Petitioner

EXHIBIT 7 TO PRE-HEARING STIPULATION

FMCC operated in a competitive marketplace at both a retail and wholesale level. Most, though not all, authorized Ford dealers used the FMCC wholesale dealer plan. FMCC also handled retail and, on a very infrequent basis, wholesale financing for used cars regardless of the manufacturer so long as the used car was in the inventory of a dealer with whom FMCC had a relationship.

At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers. While some dealers did not use the FMCC plan, most did. There was no requirement that the dealer use the FMCC plan.

To use the FMCC plan, the dealer would complete an Application for Wholesale Financing and Security Agreement, which included a designation of FMCC in Dearborn as the attorney-in-fact for the dealer. This designation authorized the execution of promissory notes and security instruments necessary for the wholesale financing plan. The FMCC branch assembled information from the dealer and undertook a financial investigation of the dealer. The amount of the line of credit sought by the dealer was the principal factor in determining whether the FMCC branch or headquarters components in Dearborn authorized the arrangement. During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May 1982, based on greater authority having been given to all branches, the number of branch approvals increased to approximately 35%.

If approval was given, the FMCC branch notified the Ford Motor Co. district sales office ("DSO") in Jacksonville, Florida. If approval was given by a FMCC headquarters component in Dearborn, the FMCC branch was notified by Dearborn of that fact and the branch notified the DSO.

The dealer ordered cars through the DSO, which in turn placed the order with the appropriate assembly plant none of which were located in Florida. The certificate of origin usually accompanied the car to the dealer but, except for infrequent occasions, did not go through the branch in any event. At the time of delivery to the carrier, the dealer's attorney-in-fact, an FMCC/Dearborn employee, authorized the draw against the dealer's line of credit with FMCC. FMCC credited Ford Motor Co.'s account for the amount of the vehicle.

The dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida financial institution. The FMCC branch received instructions from FMCC headquarters in Dearborn on the amount of money to be retained in this account. The FMCC branch called Mellon Bank, which was not in Florida, daily and Mellon arranged for the transfer of the balance. The wire transfer was always made to the same "pooling bank" in Pittsburgh, Pennsylvania. While the branch deposited money to the Florida bank, the branch drew its funds only from a Detroit, Michigan bank. None of the "wholesale" deposits could be used by the branch for use in financing retail transactions, or any other purpose.

When the dealer sold the car, either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch. Notice then was given to Dearborn to cancel the "wholesale" indebtedness. The dealer satisfied the principal balance due on the car. Within ten working days after month end, the FMCC branch billed the dealer for the monthly accrued interest. The dealer satisfied this amount by the billed month end (e.g.—a car is sold May 10, the dealer pays FMCC the principal amount on May 10, the interest is computed for the period May 1-May 10, FMCC bills the dealer before the end of the first week of June, and the dealer pays the May 1-May 10 interest

by June 20). The FMCC branch would include other funds as a part of the regular "wholesale" deposits to the Florida bank.

The FMCC branch could engage in direct floor plan financing when a "dealer trade" occurred. This transaction is explained as follows: Dealer Red had a red car. Dealer White had a white car. White sells the white car to Red and receives a check from Red payable to White. White also wants a car to sell so he gets the red car, too. White goes to FMCC branch, gets a check for Red, finances the red car and pays off Red. Red now has and sells the white car. White now has: paid off FMCC for the white car; "bought" the red car; and financed the red car with the FMCC branch (not Dearborn). The dealer also could simply transfer the car to another dealer subject to approval by the FMCC branch. Under the terms of the transfer, FMCC's security interest would simply be transferred with the car to the new dealer.

Aside from handling dealer money and dealer trades, the FMCC branch also performed audits of dealers to insure cars were not sold out of trust (i.e., without notice of the sale and satisfaction of the indebtedness owed to FMCC).

The Florida FMCC branches also were involved in wholesale and retail financing of tractors and farm equipment. At the retail level, the process was identical to the process used for cars, although a UCC statement was filed in the State of Florida for items to be kept in Florida. At the wholesale level, the dealer provided the FMCC branch with a promissory note covering the entire line of credit. Documentary stamps were affixed locally (i.e. in Florida) to the notes and the notes were retained locally. The dealer, however, ordered the tractor through the same mechanism used for cars and FMCC paid Ford Motor Co. in Michigan. If the dealer

exceeded the amount on the note, a new additional note with stamps affixed was obtained.

At the retail level, FMCC actively competed with local banks to provide financing. The dealer could submit a proposed retail contract to FMCC and other institutions for financing to maximize the likelihood that the customer would obtain financing approval and thereby complete a sale. The retail application was submitted to the FMCC branch, which conducted a financial check on the consumer. If the deal were accepted, the dealer satisfied its wholesale obligation on the vehicle. Simultaneously or shortly thereafter, the dealer formally assigned the financing contract to FMCC. The dealer then could either: 1) present the contract to the FMCC branch and get a check directly, which was rare; or 2) prepare and submit a sight draft to a Florida bank for payment. If the FMCC branch paid the bank with the FMCC Michigan check the same day the draft was presented, the bank paid the dealer on the sight draft through normal banking channels. FMCC and the dealer exchanged checks—they did not simply use accounting book entries to eliminate the wholesale receivable.

The dealer received the principal amount (purchase price less the down payment) from the FMCC branch on the retail financing contract. The dealer could "sell" the note to FMCC under a repurchase or without recourse provision. Under the repurchase provision, if the purchaser defaulted, FMCC repossessed the car and presented it to the dealer for repurchase. If the note were without recourse, FMCC handled the problem directly[.] FMCC repossessed the car, and sold it at the automobile wholesale auction.

If the retail financing contract was approved, the Florida branch sent the *original* financing contract to Dearborn which maintained the original contract in Michigan. The FMCC branch prepared a report, and

sent the amount owed for Florida documentary stamps to the state on a monthly basis. The FMCC branch retained the car title, a copy of the financing contract, and background financial information on the consumer. Absent some direct communication by the purchaser or a problem with delinquency, the branch would not hear from or see the consumer.

The consumer received a payment coupon book. Payment was made to a FMCC in care of a Florida financial institution which handled the money in accordance with FMCC/Dearborn instruction. A consumer could also make walk-in payments directly at a FMCC branch. However, the branch had no control over these funds. Reports of payments were sent to Dearborn by the payment center. Dearborn then provided the branch with updated computer information on the account by account number and amount. When a zero dollar balance was achieved, the loan was satisfied, and the branch sent the Department of Motor Vehicles a notice that the lien was satisfied. The car title would be sent to the consumer. If the consumer sold or traded the car prior to paying off the loan, the branch received the final payment and released the title. If the branch received either a final or interim payment by the consumer, those funds were deposited into the same Florida bank account as the "wholesale" payment received from the dealer. Accordingly, the branch could not utilize those funds either.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

INTERROGATORIES TO RESPONDENT

Petitioner Ford Motor Credit Company requests the Department of Revenue to provide written responses under oath to the following interrogatories.

1. Is it the policy of the Department of Revenue to collect, assess, or impose the Florida Intangible Tax on intangibles arising in the following situations:

a) a sale of tangible personal property is made in Florida, the intangible (note) is executed in Florida and maintained and serviced in Florida, and the tangible property is shipped from Florida (F.O.B. Florida) to another state pursuant to the terms of the contract for sale;

b) a sale of tangible property is made in Florida, the property is delivered to the customer/purchaser in Florida, the intangible (note) is executed and retained and serviced in Florida but the customer/purchaser subsequently permanently removes the tangible property from and uses the tangible property outside of Florida;

c) a sale of tangible property is made in Florida, the intangible (note) is created in Florida, the tangible prop-

erty is delivered to a customer/purchaser in Florida but the owner of the intangible subsequently sends the note out of Florida and servicing of the intangible is made outside of Florida;

d) a sale of tangible property is made outside of Florida, the tangible property is delivered outside of Florida, the intangible (note) is executed outside of Florida, servicing of the note is performed outside of Florida, but the customer/purchaser of the tangible property takes to and maintains the tangible property in Florida subsequent to the sale;

e) a sale of tangible property is made outside of Florida, the tangible property is delivered outside of Florida, the intangible (note) is executed outside of Florida, the intangible is serviced outside of Florida, but subsequent to the sale and execution of the note, the customer/purchaser of the tangible property moves the property to Florida and the owner of the intangible transfers the intangible and servicing responsibility for the intangible to its Florida office.

[Respondent's Initial Response to Interrogatory 1]

1.(a) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response;

What constitutes a "sale"; who is the owner of the intangible; what does "maintained and serviced in Florida" mean?

1.(b) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "retained and serviced in Florida" mean?

1.(c) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "servicing of the intangible" outside of Florida mean?

1.(d) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "servicing of the note is performed outside of Florida" mean?

1.(e) See response to 1.(d) above; in addition, what is meant by "servicing responsibility."

2. Has the Department of Revenue implemented the policy by imposing, collecting, or assessing the intangible tax in each of the five situations delineated in interrogatory no. 1.

[Respondent's Initial Response to Interrogatory 2]

Respondent is unable to frame a response to this Interrogatory due to the lack of pertinent information.

3. Does the presence or absence of a place of business in Florida by the owner of the intangible affect the Department of Revenue's determination to impose, collect, or assess the intangible tax in each of the five situations delineated in interrogatory no. 1.

[Respondent's Initial Response to Interrogatory 3]

Respondent is unable to frame a response to this Interrogatory due to the lack of pertinent information.

4. If the answer to interrogatory no. 3 is in the affirmative, state how the Department of Revenue's determination is affected.

[Respondent's Initial Response to Interrogatory 4]

Respondent is unable to furnish a response to this Interrogatory due to the lack of pertinent information.

/s/ J. V. Parramore, Jr.

Subscribed and sworn to before me this 26th day of September, 1986.

/s/ Janice S. Jacobs
Notary Public,
State of Florida

My Commission Expires
Aug. 7, 1990

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

SUPPLEMENTAL RESPONSE TO
PETITIONER'S INTERROGATORIES

Respondent, Florida Department of Revenue, submits the following in response to Interrogatories to Respondent served August 30, 1986. A previous Response to these Interrogatories was served on October 1, 1986, in which Respondent objected to most of the Interrogatories on the ground that Petitioner had not furnished sufficient information to enable Respondent to frame a Response. By letter dated October 17, 1986, Petitioner provided Respondent with definitions of the terms and phrases used in the Interrogatories and the following Supplemental Response incorporates and utilizes the definitions supplied in said letter.

With reference to Interrogatories 1a through 1e, Respondent initially wishes to point out that the Florida Department of Revenue is the state agency charged with the administration, collection and enforcement of the Intangible Personal Property Taxes imposed by the Legislature in Chapter 199, *Fla. Stat.* The Legislature, not the Florida Department of Revenue, imposes this tax.

RESPONSES

1. a) Chapter 199, *Fla. Stat.*, imposes an annual tax of 1 mill on all persons who are legal residents of this state who own or manage intangible property. Therefore, intangible property arising out of a sale of property in this state which is "maintained and serviced in Florida" is subject to taxation under Chapter 199, F.S.

b) Same as 1a above.

c) Intangible property arising out of a Florida sale is subject to taxation under Chapter 199, *Fla. Stat.*

d) The intangible property arising out of the sale wholly outside of Florida has no tax situs in Florida, provided the owner is not domiciled in Florida.

e) Chapter 199, *Fla. Stat.*, imposes an annual tax of 1 mill on all persons who are legal residents of this state who own or manage intangible property. The transfer of intangible property to the owner's Florida office for "servicing responsibility" would subject the intangible property to taxation under Chapter 199, *Fla. Stat.*

2. Yes.

3. Yes.

4. It is one of the factors considered in determining if the owner of the intangible is doing business in Florida.

/s/ J. V. Parramore, Jr.
J. V. PARRAMORE, JR.
Department of Revenue

Sworn to and subscribed before me this 2nd day of December, 1986.

/s/ Janice S. Jacobs
Notary Public, State of Florida
My Commission Expires
Aug. 7, 1990

No. 88-1847

Supreme Court, U.S.
F I L E D

AUG 10 1990

JOSEPH E. GARNICK, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

BRIEF FOR APPELLANT

JAMES E. TRIBBLE
BLACKWELL & WALKER, P.A.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

MARK L. EVANS
Counsel of Record
PATRICIA M. LACEY
ANTHONY F. SHELLEY
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Appellant

Of Counsel:

FRANK A. STOCKING
JOHN P. VAN DUSEN
JOHN M. NEBERLE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
(313) 323-0537

QUESTIONS PRESENTED

Florida imposes an unapportioned annual tax on the full value of all intangible property either (1) owned by a Florida domiciliary, regardless of the property's "business situs," or (2) having a Florida "business situs," regardless of the owner's domicile. The questions presented are:

1. Whether this Court's "internal consistency" test—designed to detect state taxes that violate the Commerce Clause by exposing interstate commerce to a discriminatory risk of multiple taxation—applies in the case of a tax on intangible property.

2. Whether a tax on intangible property fails the "internal consistency" test if, as a result of its enactment by every state, an interstate business would pay multiple taxes on the full value of its intangible property while an exclusively intrastate competitor would pay only a single tax to its state of domicile.

PARTIES AND AFFILIATED COMPANIES

All parties are named in the caption.

Appellant Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. Ford Motor Credit Company has no subsidiary that is not wholly owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES AND AFFILIATED COMPANIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT	4
A. Florida's Intangible Property Tax	4
B. Ford's Business Activity	7
C. Proceedings Below	9
SUMMARY OF ARGUMENT	11
ARGUMENT	15
I. UNDER THE INTERNAL CONSISTENCY TEST, STATE TAXES MUST BE STRUCTURED TO AVOID SUBJECTING INTERSTATE COMMERCE TO A RISK OF MULTIPLE TAXATION FROM WHICH INTRASTATE COMMERCE IS PROTECTED	15
II. FLORIDA'S UNAPPORTIONED TAX FAILS THE INTERNAL CONSISTENCY TEST BECAUSE IT EXPOSES INTANGIBLE PROPERTY ARISING OUT OF INTERSTATE COMMERCE TO A DISCRIMINATORY RISK OF MULTIPLE TAXATION	22
A. If Every State Imposed the Same Tax, There Would Be Impermissible Interference with Free Trade	22

TABLE OF CONTENTS—Continued

	Page
B. The Cause of the Problem Is the State's Failure to Apportion the Tax	24
III. THERE IS NO EXCEPTION TO THE INTERNAL CONSISTENCY TEST FOR PROPERTY TAXES IN GENERAL OR INTANGIBLE PROPERTY TAXES IN PARTICULAR..	29
A. Property Taxes, No Less Than Income and Excise Taxes, Can Interfere with the Free Flow of Interstate Commerce and Are Subject to Scrutiny Under the Same Commerce Clause Standards	29
B. Nothing About Intangible Property Justifies Depriving It of Ordinary Commerce Clause Protections	32
C. This Court's Due Process Decisions Do Not Override Applicable Commerce Clause Restrictions Against Multiple Taxation	36
CONCLUSION	39
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Allis-Chalmers Credit Corp. v. Department of Revenue</i> , 456 So. 2d 899 (Fla. Dist. Ct. App.), <i>pet. for rev. dismissed</i> , 458 So. 2d 271 (Fla. 1984)	6
<i>Allstate Enterprises, Inc. v. State</i> , 398 So. 2d 849 (Fla. Dist. Ct. App. 1981)	7
<i>American Refrigerator Transit Co. v. Hall</i> , 174 U.S. 70 (1899)	30
<i>American Trucking Ass'ns v. Scheiner</i> , 483 U.S. 266 (1987)	21, 36
<i>Armco Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	12, 18, 20, 24, 25
<i>Aronson v. Commonwealth</i> , 401 Mass. 244, 516 N.E.2d 137 (1987), <i>cert. denied</i> , 109 S. Ct. 58 (1988)	34
<i>Ashland Oil, Inc. v. Caryl</i> , No. 88-421 (June 28, 1990)	20
<i>Boston Stock Exchange v. State Tax Comm'n</i> , 429 U.S. 318 (1977)	15, 16, 34
<i>Braniff Airways, Inc. v. Nebraska Board of Equalization</i> , 347 U.S. 590 (1954)	30
<i>Central Greyhound Lines, Inc. v. Mealey</i> , 334 U.S. 653 (1948)	25
<i>Central R.R. v. Pennsylvania</i> , 370 U.S. 607 (1962) ..	30, 31
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	29, 30
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	<i>passim</i>
<i>Container Corp. v. Franchise Tax Board</i> , 463 U.S. 159 (1983)	17
<i>Curry v. McCanless</i> , 307 U.S. 357 (1939)	14, 30, 33, 37, 38
<i>Dominion National Bank v. Olsen</i> , 771 F.2d 108 (6th Cir. 1985)	34
<i>Florida Steel Corp. v. Dickinson</i> , 308 So. 2d 623 (Fla. Dist. Ct. App. 1975), <i>aff'd</i> , 328 So. 2d 418 (Fla. 1976)	5
<i>Florida Steel Corp. v. Dickinson</i> , 328 So. 2d 418 (Fla. 1976)	5, 7

TABLE OF AUTHORITIES—Continued

	Page
<i>Freeman v. Hewit</i> , 329 U.S. 249 (1946)	15, 24, 25
<i>General Motors Corp. v. Washington</i> , 377 U.S. 436 (1964)	18
<i>Goldberg v. Sweet</i> , 109 S. Ct. 582 (1989)	passim
<i>Gwin, White & Prince, Inc. v. Henneford</i> , 305 U.S. 434 (1939)	16
<i>Halliburton Oil Well Cementing Co. v. Reily</i> , 373 U.S. 64 (1963)	18, 22
<i>McLeod v. J.E. Dilworth Co.</i> , 322 U.S. 327 (1944) ..	15
<i>Mobil Oil Corp. v. Commissioner of Taxes</i> , 445 U.S. 425 (1980)	14, 21, 24, 35, 36
<i>Moorman Mfg. Co. v. Bair</i> , 437 U.S. 267 (1978) ..	19, 20, 28
<i>Nashville, C. & St. L. Ry. v. Browning</i> , 310 U.S. 362 (1940)	30
<i>National Mines Corp. v. Caryl</i> , No. 89-337 (June 28, 1990)	20
<i>Norfolk & Western Ry. v. Missouri State Tax Comm'n</i> , 390 U.S. 317 (1968)	30
<i>Northwest Airlines, Inc. v. Minnesota</i> , 322 U.S. 292 (1944)	30
<i>Ott v. Mississippi Valley Barge Line Co.</i> , 336 U.S. 169 (1949)	11, 16, 30
<i>Pullman's Palace-Car Co. v. Pennsylvania</i> , 141 U.S. 18 (1891)	13, 17, 31
<i>Standard Oil Co. v. Peck</i> , 342 U.S. 382 (1952)	30, 31
<i>State Tax Comm'n v. Aldrich</i> , 316 U.S. 174 (1942)	14, 37, 38
<i>Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue</i> , 483 U.S. 232 (1987)	passim
<i>Western Live Stock v. Bureau of Revenue</i> , 303 U.S. 250 (1938)	17
<i>Westinghouse Electric Corp. v. Tully</i> , 466 U.S. 388 (1984)	15
<i>Wilson v. Department of Revenue</i> , 302 Or. 128, 727 P.2d 614 (1986)	34

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 3	2
28 U.S.C. § 1257 (2) (1982)	2

TABLE OF AUTHORITIES—Continued

	Page
Pub. L. No. 100-352, 102 Stat. 662 (1988)	2
Fla. Stat.	
§ 72.011 (1989)	10
§ 199.023 (1) (1983)	3, 5, 33
§ 199.032 (1983)	3, 5, 22
§ 199.052 (1) (1983)	3, 5, 22
§ 199.112 (1) (1983)	3, 6, 9, 22
§ 201.08 (1989)	5
Mich. Comp. Laws (1986)	
§ 205.131 (c)	23
§ 205.132 (a)	23
§ 205.133 (b) (12)	23

MISCELLANEOUS

<i>Developments in the Law—Federal Limitations on State Taxation of Interstate Business</i> , 75 Harv. L. Rev. 953 (1962)	33
<i>Hellerstein, Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation</i> , 87 Mich. L. Rev. 138 (1988)	19, 23, 27, 28

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 88-1847

FORD MOTOR CREDIT COMPANY,
Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District (J.S. App. 1-5)¹ is reported at 537 So. 2d 1011. The order of the Supreme Court of Florida denying the petition for review (J.S. App. 21) is reported at 542 So. 2d 988. The final order of the Florida Department of Revenue (J.S. App. 6-20) is not reported.

¹ "J.S. App." refers to the Appendix to the Jurisdictional Statement. "J.A." refers to the Joint Appendix.

JURISDICTION

The judgment of the District Court of Appeal of Florida, First District, was entered on September 13, 1988 (J.S. App. 1; J.A. 1). A timely motion for rehearing was denied on October 12, 1988 (J.S. App. 23; J.A. 1). In response to appellant's timely petition for discretionary review, the Supreme Court of Florida entered an order declining jurisdiction on February 22, 1989 (J.S. App. 21; J.A. 1). A notice of appeal to this Court (J.S. App. 24-26) was timely filed in the District Court of Appeal on April 5, 1989 (J.A. 1). The appeal was docketed on May 12, 1989, and the Court noted probable jurisdiction on June 11, 1990.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(2) (1982). Section 1257 was amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988), which eliminated the appellate review provision of section 1257(2) and provided for review of state court judgments exclusively by writ of certiorari. Section 7 of Pub. L. No. 100-352 provided that the amendments would take effect on September 25, 1988, "except that such amendments shall not . . . affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." 102 Stat. 664. Because the judgment of the District Court of Appeal was entered on September 13, 1988—prior to the effective date of the statutory amendments—the appellate jurisdiction of this Court under former section 1257(2) was not affected by the 1988 amendments.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in relevant part:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States

Florida Statutes Chapter 199 (1983), Intangible Personal Property Taxes, is set forth in full in the appendix to this brief. It provides in relevant part:

§ 199.032 Levy.—There is hereby levied, to be assessed and collected as provided by this chapter:

(1) An annual tax of 1 mill on the dollar of the just valuation of all intangible personal property

§ 199.023 Definitions.— . . .

(1) "Intangible personal property" means all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including, but not limited to, the following:

. . .

(d) All notes, bonds, and other obligations for the payment of money.

§ 199.052 Returns.—

(1) It is hereby made the duty of every person in the state, and every person who has become a legal resident of the state on or before January 1, who owns or has control, management, or custody of intangible personal property which is subject to annual taxation under this chapter to file a sworn return with the department on or before June 30 of each year, listing separately the character, description, location, and just valuation of all such property. This subsection applies to any person, regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state.

§ 199.112 Business situs.—

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state

are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. . . .

STATEMENT

Florida imposes an unapportioned annual tax on the full value of all intangible personal property that is owned by a Florida domiciliary or that has a "business situs" in the state. Intangible property is deemed to have a "business situs" in Florida if it arises out of a "sale" of property in the state, a term defined to include the delivery or shipment of property to a Florida purchaser even if the sale is consummated or title passes elsewhere.

Ford challenged the validity of the tax under the Commerce Clause, arguing that the tax violates this Court's "internal consistency" test by exposing interstate commerce to a discriminatory risk of multiple taxation from which purely local commerce is protected. The Florida District Court of Appeal sustained the tax on the ground that the "internal consistency" test does not apply to property taxation.

A. Florida's Intangible Property Tax

During the years at issue (1980-1982), Florida levied "[a]n annual tax of 1 mill on the dollar [one-tenth of one percent] of the just valuation of all intangible personal property," including certain "notes, bonds, and

other obligations for the payment of money." Fla. Stat. §§ 199.032, 199.023(1)(d) (1983).² The statute provided that an intangible property tax return must be filed annually by every Florida domiciliary "who owns or has control, management, or custody of intangible personal property," and by every other person, "regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state." § 199.052(1).³

As reflected on the face of the statute, and as construed by the Florida courts, the tax applies if any one of several conditions is met. First, it applies to all "intangible property owned by a domiciliary corporation, regardless of business situs." J.S. App. 3, *citing Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976). Thus, for example, a note issued and approved in North Carolina in connection with the sale of property in that state to a North Carolina resident is nonetheless subject to Florida's tax if the note is owned by a Florida domiciliary. The domiciliary must pay the tax annually on the full value of the note even if it has "already been subjected to an intangible tax by another state." *Florida Steel Corp. v. Dickinson*, 308 So. 2d 623, 624 (Fla. Dist. Ct. App. 1975), *aff'd*, 328 So. 2d 418 (Fla. 1976).

Second, the tax applies to all intangible property owned by a non-domiciliary if the property has a "business situs" in Florida. The statute provides that intangibles have a business situs in Florida, "regardless of where

² The appendix to this brief reproduces in full the version of the Florida statute that was in effect during the years at issue. Excerpts of the most directly relevant provisions are set forth at pages 3-4, *supra*.

³ In addition to the annual tax on intangible property, Florida imposes a separate documentary stamp tax, assessed at the rate of \$.15 per \$100 of value, on each instrument (such as a promissory note) "made, executed, delivered, sold, transferred, or assigned" in Florida. Fla. Stat. § 201.08 (1989).

they are kept, approved as to their creation, or paid," if they "aris[e] out of, or [are] issued in connection with, the sale, leasing, or servicing of . . . personal property in the state." § 199.112(1). A "sale" is deemed to occur in Florida not only if property is sold there in the ordinary sense of the term, but also "if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale." *Id.*

Consequently, if a note is issued in connection with a sale of property in Florida (in the ordinary sense of "sale"), the statute imputes a Florida "business situs" to the note, and thereby subjects it to Florida's annual tax, even if the property was shipped to a purchaser in North Carolina. J.A. 13, 19 (state's response to interrogatory 1(a)). The result is the same even when the facts are inverted. If the sale takes place in North Carolina, the statute nevertheless imputes a Florida "business situs" to the note, and subjects it to annual taxation, if the property was shipped to a purchaser in Florida. § 199.112(1). Thus, a company that finances both Florida sales of property shipped to out-of-state purchasers and non-Florida sales of property shipped to in-state purchasers must pay Florida's annual tax on the full value of all intangibles from both categories of sales.⁴

⁴ Although not apparent from the face of the statute, the state asserts that the tax applies even to an intangible owned by a non-domiciliary that arises out of a purely out-of-state transaction if the note is subsequently sent to Florida to be maintained and serviced there. J.A. 14, 19 (state's response to interrogatory 1(e)). Conversely, according to the state, if the intangible arises out of a Florida "sale," it retains its Florida "business situs" and remains subject to the annual tax even if the note is subsequently sent to another state to be maintained and serviced in that state. J.A. 13-14, 19 (state's response to interrogatory 1(c)). See *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d 899, 903 (Fla. Dist. Ct. App.) (note arising out of a sale of equipment in Florida remains subject to the state's annual tax on intangible property even if the owner of the note "purchased and took possession of

In no case is the tax apportioned. Florida taxes the full value of every intangible to which the tax applies even if it is subject to concurrent taxation by one or more other states. See *Florida Steel Corp. v. Dickinson*, 328 So. 2d 418, 419 (Fla. 1976); J.S. App. 3-4.

B. Ford's Business Activity

The material facts are stipulated. J.A. 2-12.

Appellant Ford Motor Credit Company ("Ford") is a wholly owned subsidiary of Ford Motor Company. It is incorporated under the laws of Delaware; its principal place of business is in Michigan; and it is qualified to do business in Florida. During the period in issue, Ford maintained seven or eight branch offices in Florida, had approximately 200 employees in the state, and had contractual relationships with 130 to 150 authorized Ford Motor Company dealers in the state. J.A. 3-4.

Ford's principal business is financing wholesale and retail sales of vehicles manufactured by Ford Motor Company. It also engages in commercial, industrial, real estate, consumer loan, and lease financing in Florida and other states. J.A. 4. Ford operates in a competitive financial services marketplace at both the wholesale and retail levels. J.A. 8. The majority of the intangibles at issue in this case are accounts receivable held by Ford and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. J.A. 4.

The stipulation contains a detailed description of the manner in which Ford's wholesale and retail intangibles

[it] outside the state and receives payments thereon outside the state"), *pet. for rev. dismissed*, 458 So. 2d 271 (Fla. 1984); *Allstate Enterprises, Inc. v. State*, 398 So. 2d 849, 850 (Fla. Dist. Ct. App. 1981) (installment note issued in connection with a sale of personal property in Florida has a Florida "business situs" even though it is sold to another party and thereafter is "physically transferred to and maintained . . . in the State of Delaware").

are created and maintained. J.A. 8-12. An example of a wholesale transaction demonstrates most clearly the interstate character of Ford's financing business.

A franchised Ford Motor Company dealer typically maintains a line of credit with Ford, in most cases approved at Ford's headquarters in Michigan. The dealer places a vehicle order with Ford Motor Company's district sales office in Florida, which in turn forwards the order to an assembly plant in another state (there are no plants in Florida). Under Ford Motor Company's dealership agreements, title to the ordered vehicle passes to the dealer at the assembly plant when the vehicle is delivered to a carrier for shipment to the Florida dealer.* At that time, the dealer's attorney-in-fact in Michigan authorizes a draw against the dealer's line of credit, and Ford's Michigan headquarters credits the appropriate amount to Ford Motor Company's account. J.A. 8-9.

The dealer makes monthly payments on its indebtedness to Ford's branch office in Florida, which deposits the funds with a Florida financial institution. The Florida branch draws its operating funds only from an account in a Michigan bank; it may not use the wholesale deposits in the Florida financial institution for any purpose. Ford's Michigan headquarters instructs the branch office concerning the amounts to be maintained in the Florida account. In accordance with those instructions, the Florida branch arranges with an out-of-state financial institution to make daily wire transfers of funds from the Florida institution to a "pooling bank" in Pennsylvania. When the dealer sells the vehicle, it pays off the wholesale receivable through Ford's Florida branch, which notifies Ford's headquarters in Michigan to cancel the wholesale indebtedness. J.A. 9.

* A sample Ford Sales & Service Agreement is contained in the record as Exhibit 3 to the Pre-Hearing Stipulation. The provision governing transfer of title is ¶ 11(b), at 11-12.

While both the sale and the financing are thus consummated in other states, and the servicing of the resulting intangible is carried out in several states, Florida nonetheless imputes an in-state business situs to the intangible, and subjects it annually to the state's unapportioned intangible property tax, solely because the financed vehicle was shipped to a dealer in Florida. Fla. Stat. § 199.112(1) (1983).

Retail financing likewise implicates interstate commerce. A dealer typically enters into a retail financing contract with its customer and then offers the contract for sale in a secondary market to Ford and other institutions. Ford competes actively in the secondary market with local Florida banks. J.A. 11. If Ford acquires a contract, it transfers funds to the dealer through normal banking channels. The contract thereafter is maintained at Ford's Michigan headquarters, and the customer typically makes payment to a Florida financial institution, which handles the funds in accordance with instructions from Ford's Michigan headquarters. J.A. 11-12.

Although the intangible asset moves in interstate commerce, involves the flow of capital across state lines, and has connections with several different states, Florida nonetheless taxes its full value annually because it arose out of a sale of tangible property in that state. It makes no difference under the statute whether the debtor subsequently leaves Florida or whether the underlying property is removed from the state. See J.A. 13, 19. The tax continues to apply in full solely because the sale from which the intangible originated occurred in Florida.

C. Proceedings Below

Following an assessment and a formal administrative proceeding, the Florida Department of Revenue issued a final order determining that Ford owed approximately \$1.2 million in underpaid intangible property taxes and approximately \$500,000 in penalties, plus interest, for

the tax years 1980-1982. J.S. App. 6-20. In response to Ford's argument that the intangible property tax is invalid under the Commerce Clause of the United States Constitution, the Department's order stated that "[t]his tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue." J.S. App. 13.⁶

The District Court of Appeal affirmed the Department's order, holding that Florida's tax on intangible property "does not violate the commerce clause of the United States Constitution." J.S. App. 1. The Court acknowledged that the tax applies both to "intangible property owned by a domiciliary corporation, regardless of business situs," and to intangible property with a "business situs" in Florida, regardless of the owner's domicile. J.S. App. 3. The Court nevertheless rejected Ford's contention that "these multiple bases for taxation impermissibly burden interstate commerce" by exposing intangibles to the risk of multiple taxation. *Id.* In the Court's view, "since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property." *Id.* The Court drew no distinction between apportioned and unapportioned taxation.

The District Court of Appeal rejected use of this Court's internal consistency test. While tacitly acknowledging that the state's tax on intangible property would fail the internal consistency test, the Court stated that "the test has been applied only to franchise and excise taxes," that "[t]he United States Supreme Court has long distinguished property taxation from the taxation

⁶ In accordance with Florida procedure, Fla. Stat. § 72.011 (1989), Ford posted a bond for the amount in issue. This case thus involves no question concerning refunds of taxes already paid.

of interstate business activities through excise and income taxes," and that "[w]e find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context." J.S. App. 4-5. The Court accordingly "decline[d] to extend the application of this test to Florida's intangible property tax." J.S. App. 5.

The District Court of Appeal denied rehearing. J.S. App. 23. The Supreme Court of Florida thereafter denied a petition for discretionary review. J.S. App. 21.

SUMMARY OF ARGUMENT

I.

The Commerce Clause guarantees an area of free trade among the states and protects interstate commerce from discriminatory state taxation. Although interstate commerce may be made to bear its fair share of local tax burdens, it must not be subjected to "cumulative" taxation merely because of its "interstate character." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

The "internal consistency" test—known by that name for less than a decade but used by the Court for the past century—is designed to identify structurally defective state tax schemes that intrinsically subject interstate commerce to risks of cumulative tax burdens from which intrastate commerce is protected. The test "focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Goldberg v. Sweet*, 109 S. Ct. 582, 589 (1989). If an interstate company would be required to pay multiple taxes in that situation while a comparable intrastate company would pay only a single tax, the statute fails the internal consistency test and violates the Commerce Clause.

II.

A. Florida's tax on intangible property fails the internal consistency test. It applies to every intangible that is owned by a Florida domiciliary, that arises out of a sale of property in Florida, or that arises out of a sale elsewhere if the property is delivered or shipped to Florida. If every state were to impose a tax identical to Florida's, a company that conducts its financial services business in interstate commerce would be forced to pay multiple unapportioned state taxes on the full value of the same item of intangible property—one tax to the company's state of domicile, a second to the state in which the underlying sale takes place, and a third to the state to which the underlying property is delivered or shipped. By contrast, a company that engages in the same financial services business but confines its operations solely within its state of domicile would pay only a single tax. Florida's statute therefore impedes free trade among the states by exposing interstate business to cumulative taxation solely on account of its interstate character.

There is no need to confirm the statute's facially discriminatory effect by examining the taxes actually imposed by other states. The invalidity of the Florida tax is established on the basis of its own inherent defect and does not "depend on the shifting complexities of the tax codes of 49 other States." *Armco Inc. v. Hardesty*, 467 U.S. 638, 645 (1984).

B. Florida's statute fails the internal consistency test because it attempts to tax the full value of all intangibles that are within the state's taxing jurisdiction, and makes no provision at all for apportionment, even though the same intangibles may be taxed concurrently by other states. As this Court's decisions make clear, fair apportionment is a prerequisite to constitutionally permissible state taxation of interstate commerce.

Florida can tax either (1) the full value of a portion of the intangibles with which it has nexus, or (2) a portion of the value of all the intangibles with which it has nexus. Either approach would solve the internal consistency problem. For example, if every state were to tax the full value of only those intangibles owned by its domiciliaries, interstate and intrastate companies alike would pay a single tax on all their intangible property to their state of domicile. Likewise, if every state were to tax half the value of each intangible owned by a domiciliary and half the value of each intangible with an in-state "business situs" (assuming that an intangible could have only a single "business situs"), all companies would pay a total of one full tax on the value of each intangible, and interstate commerce would suffer no multiple taxation. By contrast, Florida's statute taxes the full value of all intangibles that meet either condition, thereby impermissibly subjecting interstate commerce to a risk of multiple taxation that only a Florida domiciliary can avoid.

III.

A. The Florida District Court of Appeal mistakenly concluded that the internal consistency test should have no application in the case of a property tax. The Commerce Clause principles that gave rise to the internal consistency test, however, constrain state property taxation no less than other forms of state taxation. Indeed, the Court first applied what we now know as the internal consistency test in a property tax case. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). The Court there upheld a state tax on a railcar company's capital stock apportioned on the basis of the state's share of the total rail mileage over which the cars traveled. The Court explained that, if every state were to adopt the same tax, "the company would be assessed upon the whole value of its capital stock, and no more." *Id.* at 26.

B. There is nothing peculiar about intangible property that would justify depriving it of normal Commerce Clause protections. Intangible property rights—of which notes and other forms of indebtedness are classic examples—inhere in the legal relationships among persons, often arise out of interstate transactions, and are no less vulnerable to discriminatory state taxation than are other aspects of interstate commerce. Commercial transactions frequently require financing that depends on the availability of capital from interstate sources. The intangible property created in the course of such transactions must be protected from undue burdens for the same reason that the underlying commerce is protected. If the flow of capital were impeded by unfair exactions, the constitutional guarantee of free interstate trade would be significantly and unjustifiably compromised.

As this Court held in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), income from intangible property must be apportioned when several states provide benefits and protection that contribute to a company's ability to earn that income. An ad valorem tax on the intangible property itself must likewise be apportioned if, as here, several jurisdictions provide benefits and protection that contribute to the value of the intangible property.

C. This Court's Due Process decisions in *Curry v. McCannless*, 307 U.S. 357 (1939), and *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942), do not permit multiple unapportioned taxation of intangible property that arises out of interstate commerce. Those cases held only that a nondomiciliary state may lawfully tax the transfer at death of intangible property with which it has a jurisdictional nexus. Neither case considered any issue of apportionment or discrimination. Neither addressed any question under the Commerce Clause. In fact, neither involved interstate commerce. Nothing in those decisions

supports the Florida court's erroneous impression that intangible property, alone among all objects of state taxation, deserves no constitutional protection against the risk of duplicative taxation.

ARGUMENT

I. UNDER THE INTERNAL CONSISTENCY TEST, STATE TAXES MUST BE STRUCTURED TO AVOID SUBJECTING INTERSTATE COMMERCE TO A RISK OF MULTIPLE TAXATION FROM WHICH INTRASTATE COMMERCE IS PROTECTED

In considering the constitutionality of a state tax, this Court "begin[s] with the principle that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977), quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). "The undisputed corollary of that principle is that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States,'" including the States' power to tax." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984), quoting *Boston Stock Exchange*, 429 U.S. at 328, and *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

That does not mean that interstate commerce is entitled to "absolute immunity" from state taxation. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). On the contrary, "the Court consistently has indicated that 'interstate commerce may be made to pay its way.'" *Id.* But it does mean that a state may not saddle interstate trade with tax burdens from which intrastate trade is exempt. A tax violates the Commerce

Clause if—even “though nominally local”—“it imposes upon [interstate commerce], merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.” *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). The guiding principle is that commerce across state lines must not be subjected to the risk of “cumulative” tax burdens on account of its “interstate character.” *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

Under the familiar four-prong test of *Complete Auto Transit, Inc. v. Brady*, a state tax withstands Commerce Clause scrutiny if it “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” 430 U.S. at 279. The focus in this case is on the second and third prongs of the *Complete Auto* standard: the apportionment requirement and the anti-discrimination principle. Those are the restrictions to which the “internal consistency” test is addressed.

“To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.” *Goldberg v. Sweet*, 109 S. Ct. 582, 589 (1989). “Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.” *Id.* If, under that hypothesis, an interstate company would pay multiple taxes while a comparable intrastate company would pay only one tax, the statute fails the test.

An internally inconsistent tax impermissibly “forecloses tax-neutral decisions,” *Boston Stock Exchange*, 429 U.S. at 331, because it forces interstate commerce to bear a risk of cumulative taxation from which purely local trade is shielded. The internal consistency test vindicates fundamental Commerce Clause principles by rooting out

congenitally defective taxes that on their face erect economic impediments to the conduct of interstate commerce, either because they fail to apportion fairly or because they discriminate against interstate commerce, or both.

The phrase “internal consistency” was coined in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), where the Court considered the fairness of California’s formula for apportioning the net income of a multinational unitary business. The Court stated that “[t]he first, and . . . obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business’ income being taxed.” *Id.* at 169.

But the test has much deeper roots. One of its earliest manifestations was in a property tax case, *Pullman’s Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). In that seminal Commerce Clause decision, the Court upheld a Pennsylvania tax on the capital stock of an Illinois corporation that operated specialized rail passenger cars in interstate commerce. Pennsylvania taxed only that portion of the corporation’s capital stock that corresponded to the state’s share of the total rail mileage over which the passenger cars were operated. The Court held that the state’s mileage-based apportionment mechanism was “just and equitable.” *Id.* at 26. Using the same analysis that we now know as the “internal consistency” test, the Court reasoned that, “if [the Pennsylvania tax] were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more.” *Id.*

Similarly, in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court sustained a New Mexico gross receipts tax on local sales of advertising

space in a journal published within the state but circulated in part to subscribers outside the state. In a version of internal consistency analysis, the Court reasoned that, because the tax was imposed on events that "occur in New Mexico and not elsewhere," it was "not one which in form or substance can be repeated by other states in such a manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), apparently was the first case in which the Court used an internal consistency analysis to invalidate a state tax. At issue was a Louisiana sales and use tax system that operated to impose a heavier burden on items assembled out-of-state and used in Louisiana than on similar items both assembled and used in Louisiana. The Court observed that, "[i]f similar unequal tax structures were adopted in other States, a not unlikely result of affirming here," those engaged in the "multi-state activities" of assembling items in one state for use in others would be penalized in comparison with those who assembled items and used them in the same state. *Id.* at 72.⁷

An internal consistency inquiry may also be used to discern whether a particular state can fairly be held responsible for multiple taxation that results from the

⁷ One year later, Justice Goldberg employed a similar analysis in his dissenting opinion in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the rationale of which the Court subsequently adopted in *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), and *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240-48 (1987). In explaining why he would have invalidated the Washington tax at issue, Justice Goldberg observed that "an out-of-state firm manufacturing goods in a State having the same taxation provisions as does Washington would be subjected to two taxes on interstate sales to Washington customers." 377 U.S. at 460. Such a "threat of duplicative taxation" could "discourage the development of multistate business operations" and "inhibit[] the realization of a free and open economy unencumbered by local tariffs and protective devices." *Id.*

interplay of two or more differing state taxes. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), which upheld Iowa's single-factor sales formula for apportioning the net income of a multistate corporation, the taxpayer argued that the formula impermissibly subjected interstate businesses to duplicative taxation because it conflicted with the three-factor formula used by most other states. Using a form of internal consistency analysis, however, the Court observed that the risk of multiple taxation would be eliminated if other states were to adopt Iowa's formula. *Id.* at 277. Consequently, there was no reason to suppose that Iowa, rather than the other states, "was necessarily at fault in a constitutional sense." *Id.*

Moorman established the principle that *some* risk of multiple taxation is inevitable in our federal system. Because each state is entitled, consistent with basic Commerce Clause limitations, to structure its taxing system in a manner that best suits its needs, there may be some unavoidable "overlap" if different states adopt schemes that, while incompatible with each other, are entirely reasonable in their own right. *Id.* But where the risk of multiple taxation is inherent in a particular state's taxing scheme—that is, in *Moorman's* terms, where the risk would persist even if all other states adopted the same system—responsibility for the problem can be assigned to that state alone. In those circumstances, that state is "at fault in a constitutional sense." *Id.* at 277. As Professor Hellerstein has put it:

Adventitious multiple taxation arising from the interaction of two inconsistent, but intrinsically fair, apportionment formulas may be the price we pay for federalism. Predictable multiple taxation arising from the generalized application of a single, intrinsically unfair, apportionment formula is a price we need not pay.

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 141 (1988).

In cases decided after *Moorman*, the Court has applied the internal consistency test to invalidate several "intrinsically unfair" state taxes that jeopardized free trade by subjecting interstate commerce to the hazard of "[p]redictable multiple taxation." *Id.*

In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court struck down a West Virginia statute that taxed gross receipts from wholesaling and manufacturing but exempted from the wholesaling tax those who were subject to the state's manufacturing tax. Applying the internal consistency test, the Court determined that, if other states were to impose the same taxing scheme, companies that manufacture in one state and sell at wholesale in another state would pay both a manufacturing and a wholesaling tax, while companies that operate entirely within one state would pay only a manufacturing tax. *Id.* at 644. The discriminatory risk of multiple taxation was therefore attributable to the very structure of the West Virginia tax.⁸

The tax in *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), was the mirror image of that in *Armco*. Like West Virginia, Washington taxed the activities of manufacturing and wholesaling within the state and provided a "multiple activities" exemption for those who would otherwise have to pay both taxes. Instead of exempting local manufacturers from the wholesaling tax, however, Washington exempted local wholesalers from the manufacturing tax. The Court held that the effect was no different from that in *Armco*. Invoking the internal consistency test, the Court ruled that, if Washington's tax system were replicated in other states, those who manufacture and sell in different states would be subject, as in *Armco*, to "a multiple burden" from which those who manufacture

⁸ The Court recently held that *Armco* applies retroactively. *Ashland Oil, Inc. v. Caryl*, No. 88-421 (June 28, 1990); *National Mines Corp. v. Caryl*, No. 89-337 (June 28, 1990).

and sell in a single state would be exempt. 483 U.S. at 248.

In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), decided the same day as *Tyler Pipe*, the Court again applied the internal consistency test to invalidate Pennsylvania's lump-sum annual taxes on the operation of trucks on the state's highways. "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. That is so because those who operate their trucks in several states would be required to pay multiple flat taxes, while those who limit their operations to a single state would pay only one tax.

There was no such discrimination on the face of the statute in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989). The Court there upheld an Illinois tax on interstate telephone calls that originated or terminated in Illinois and that were charged to an Illinois service address. The Court concluded that the tax was "internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call." *Id.* at 589.

In sum, the internal consistency test, first used nearly a century ago, is now an established component of the Court's Commerce Clause jurisprudence, integral to the "consistent and rational method of inquiry" that the Court has applied in the wake of *Complete Auto. Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980). It has stood the test of time because it is a simple, practicable tool that can be applied easily by state courts and legislatures to expose intrinsic flaws in state taxes. The test does not solve every potential Commerce Clause problem, but it clearly and logically marks the outer boundaries of constitutional state taxation and serves as an important screening device to identify

facially defective taxing schemes that inevitably endanger free trade among the states.

II. FLORIDA'S UNAPPORTIONED TAX FAILS THE INTERNAL CONSISTENCY TEST BECAUSE IT EXPOSES INTANGIBLE PROPERTY ARISING OUT OF INTERSTATE COMMERCE TO A DISCRIMINATORY RISK OF MULTIPLE TAXATION

A. If Every State Imposed the Same Tax, There Would Be Impermissible Interference with Free Trade

Florida's tax fails the internal consistency test. The tax is imposed annually, without any apportionment, on the full value of all intangible property that is owned by a Florida domiciliary, regardless of the property's "business situs," or that has a Florida "business situs," regardless of the owner's domicile. "Business situs" is defined by the statute to encompass any intangible that arises out of a sale of property in Florida or a sale in another state of property delivered or shipped to a purchaser in Florida. Fla. Stat. §§ 199.032, 199.052(1), 199.112(1) (1983).

The tax applies, therefore, in any one of the following circumstances: (1) the owner of the intangible has a Florida domicile; (2) the intangible arises out of a sale of property in Florida; or (3) the intangible arises out of a sale elsewhere but the property is delivered or shipped to a Florida purchaser. If every state were to adopt an identical tax—"a not unlikely result of affirming here" (*Halliburton*, 372 U.S. at 72)—a company that conducts its financial services business in interstate commerce would pay as many as three different taxes on the full unitary value of each of its intangibles: one to its state of domicile, one to the state in which the sale of the financed property was consummated, and one to the state to which the financed property was delivered or shipped. A company that conducts the same financial services business but confines its operations exclusively

to its state of domicile would pay only a single tax on each intangible. Under the internal consistency test, the Florida tax is facially invalid.

Professor Hellerstein has pointed to Florida's intangible property tax as an "example of an existing taxing scheme that appears to violate the 'internal consistency' principle." Hellerstein, 87 Mich. L. Rev. at 162. He stated:

If every state adopted an intangible property tax that applied both to property owned by its domiciliaries and to property with a business situs in the state, the enterprise domiciled in one state but employing intangible property in another, where it acquires a business situs, would pay two taxes on its intangibles whereas its wholly intrastate competitor would pay but one tax. Assuming that the Court would have little difficulty in concluding that such interference with interstate capital flows affected commerce so as to warrant commerce clause scrutiny, the "impermissible interference with free trade" under the "internal consistency" doctrine would be self-evident.

Id. at 162-63 (footnotes omitted).

As a Delaware corporation with its principal place of business in Michigan, Ford is potentially exposed to a domiciliary tax elsewhere on the full value of the same intangibles that Florida taxes on account of their "business situs" in Florida.⁹ Ford bears that risk of multiple taxation solely because of the interstate nature of its

⁹ That possibility is hardly remote. For example, Michigan imposes an unapportioned tax on intangible property owned by a Michigan domiciliary. Mich. Comp. Laws §§ 205.131(c), 205.132(a) (1986). The statute currently exempts intangible property owned by a corporation that, like Ford, is engaged in business activity in the state and is subject to taxation under the Michigan Single Business Tax. *Id.* § 205.133(b)(12). But the Michigan legislature could eliminate that exemption as easily as it enacted the provision in the first place.

financial services business. By contrast, financial institutions domiciled in Florida—with whom Ford actively competes for much of the financing business that gives rise to its intangible property (J.A. 11)—bear no comparable risk of such multiple taxation if they limit their financing operations to exclusively in-state transactions.

There is no need to show that other states actually impose an intangible property tax like Florida's or that Ford suffered actual multiple taxation of its intangibles during the years in issue. When a tax fails the internal consistency test, the conclusion that it "facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States." *Tyler Pipe*, 488 U.S. at 247. "Any other rule would mean that the constitutionality of [one state's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." *Armco*, 467 U.S. at 644-45.¹⁰

B. The Cause of the Problem Is the State's Failure to Apportion the Tax

The flaw in Florida's tax is not hard to find. The tax is assessed on alternative bases—domicile in the state, sale of property in the state, or delivery or shipment of property to the state. The statute thus recognizes at least three distinct grounds on which the state may assert taxing jurisdiction over an intangible. What is good enough for Florida, however, is good enough for other states as well. In any particular case, therefore,

¹⁰ See also *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980) ("the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy"); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946) ("The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend . . . on the shifting incidence of the varying tax laws of the various States at a particular moment.").

as many as two other states might assert jurisdiction to tax the same intangible under the same jurisdictional theory. Yet the statute has no apportionment mechanism. It annually taxes 100 percent of the outstanding value of every intangible to which it applies.

That presents a classic Commerce Clause problem. As the Court has stated, "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948), quoting *Freeman v. Hewit*, 329 U.S. 249, 256 (1946). Likewise, an unfairly apportioned tax on the income of a multistate company "is a form of discrimination against interstate commerce." *Armco*, 467 U.S. at 644.

The same can be said of an unapportioned tax on intangible property that has connections with more than one state. Because each intangible has only a single, unitary value, a state tax on intangibles must be fairly apportioned to avoid discrimination against interstate commerce and interference with free trade.

Florida can choose from among several apportionment mechanisms. First, it can tax the *full* value of a *portion* of the intangibles at issue. The state might elect, for example, to tax the entire value of all intangibles owned by its domiciliaries. Assuming that domicile were defined to ensure that a corporation could have only one domicile at a time, that limitation would effectively apportion the tax, at least for internal consistency purposes: if all states were to adopt the same taxing mechanism, an interstate business would pay only a single unapportioned tax on all of its intangibles to its state of domicile. Or Florida could choose to tax the entire value of all intangibles that arise out of a sale of property in the state. That, too, would solve the internal consistency problem: if every state taxed on the basis of the location of the sale, all companies, interstate and intrastate alike, would

pay a single unapportioned tax to the one state in which the sale took place.

That is essentially the way Illinois handled the telecommunications tax at issue in *Goldberg v. Sweet*. It taxed the entire gross charge of interstate telephone calls that originated or terminated in Illinois *and that were charged to an Illinois service address*. By limiting the tax to those calls that were charged to an Illinois address, the state effectively apportioned the entire tax base in a reasonable fashion. As Justice Stevens observed in his concurring opinion, "[b]y taxing half of the relevant universe of interstate calls at full value, Illinois achieves the same economic result as taxing all of those calls at half value would achieve." 109 S. Ct. at 593.

Second, Florida can tax a *portion* of the value of *all* the intangibles at issue. For example, if Florida wishes to tax intangible property that either is owned by a Florida domiciliary or has a Florida business situs, a simple but fair method of apportionment might be to tax the entire value of an intangible that is both owned by a domiciliary *and* has an in-state business situs, and to tax half the value of an intangible that satisfies only one or the other of those standards. Assuming that "business situs" were defined to ensure that the same intangible could not have a business situs in more than one state at the same time, an apportionment formula of that sort would solve the internal consistency problem that infects Florida's current statute. If every state adopted the same tax, an interstate business would pay a tax on half the value of its intangibles to its domiciliary state and a tax on the remaining half to the states in which the intangibles have a business situs. An intrastate company would pay a tax on the full value of its intangibles to its domiciliary state. Interstate commerce would bear no discriminatory tax burden.

Thus, Florida may tax *all* of the value of a *portion* of the intangibles; or it may tax a *portion* of the value of

all the intangibles. What it cannot do is tax *all* of the value of *all* the intangibles. Yet that is precisely what Florida seeks to do. It predicates its tax on alternative jurisdictional bases, thereby sweeping into the tax base the full value of intangible property that other states can assert jurisdiction to tax on the same bases. But Florida makes no provision for apportioning the resulting interstate values.

The situation here is therefore like that in *Goldberg v. Sweet* except without the limiting feature of the Illinois statute that narrowed the tax to calls charged to an Illinois address. Had the state there attempted to tax the full value of all calls that originated or terminated in Illinois regardless of where they were charged, and if, like Florida, the state had made no other provision for apportioning the resulting tax base, there is no doubt that the tax would have failed the internal consistency test and would have violated the apportionment prong of *Complete Auto*.

Apportionment would not necessarily extinguish all risk of double taxation. For example, Florida might choose to tax intangibles on the basis of domicile, while Georgia might tax intangibles on the basis of business situs. In that case, a Florida domiciliary conducting a financial services business in Georgia would pay a tax in each state on the full value of its intangibles, while a domiciliary of either state conducting a purely intrastate financial services business would pay only a single tax to its home state. (Justice Scalia made a similar observation in his dissenting opinion in *Tyler Pipe*, 483 U.S. at 258-59. See also Hellerstein, 87 Mich. L. Rev. at 178-79.) But that is a permissible result, from the standpoint of internal consistency, for three reasons.

First, the multiple taxation in that situation is what Professor Hellerstein calls "adventitious"—that is, "arising from the interaction of two inconsistent, but intrinsically fair" taxing schemes, rather than from "the

generalized application of a single, intrinsically unfair" scheme. *Id.* at 141. Because neither state is "necessarily at fault in a constitutional sense," *Moorman*, 437 U.S. at 277, the exposure to multiple taxation in those circumstances may simply be part of "the price we pay for federalism." Hellerstein, 87 Mich. L. Rev. at 141.

Second, interstate commerce as a whole may suffer little or no net disadvantage in the hypothesized circumstances. While a Florida domiciliary operating in Georgia would pay an unapportioned tax to both states, a Georgia domiciliary operating in Florida would pay no tax to either state. Even if the accounts do not balance out precisely, the number of interstate companies that suffer may be roughly equal to the number that benefit. *See id.* at 179-80 n.221.

Third, as the Court stated in *Goldberg v. Sweet*, "to the extent that other States have passed [different] statutes which create a risk of multiple taxation, we reach that issue under the external consistency test." 109 S. Ct. at 589. That separate inquiry asks "whether the state has taxed only that portion of the . . . interstate [value] . . . which reasonably reflects the in-state component of the activity being taxed." *Id.* The external consistency test thus ensures that any multiple taxation resulting from the interaction of internally consistent taxes adopted by different states is kept within constitutionally tolerable bounds.

What is constitutionally intolerable under the Court's decisions is the risk of multiple taxation caused by an internally inconsistent scheme like Florida's.

III. THERE IS NO EXCEPTION TO THE INTERNAL CONSISTENCY TEST FOR PROPERTY TAXES IN GENERAL OR INTANGIBLE PROPERTY TAXES IN PARTICULAR

A. Property Taxes, No Less Than Income and Excise Taxes, Can Interfere with the Free Flow of Interstate Commerce and Are Subject to Scrutiny Under the Same Commerce Clause Standards

The Florida District Court of Appeal refused to apply the internal consistency test in this case. It believed that this Court "has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes." J.S. App. 4. The Court could "find no suggestion in the [Supreme] Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context." J.S. App. 5.

Contrary to the District Court of Appeal's theory, there is no basis in the Commerce Clause or in this Court's precedents for a property tax exception to the internal consistency test. At least since the decision in *Complete Auto*, it has been clear that the validity of a state tax under the Commerce Clause depends, not on its form, but on its "practical effect" in light of "economic realities." 430 U.S. at 279. Any tax that "substantially affects interstate commerce," even if it "attaches only to a 'local' or intrastate activity," is subject to scrutiny under the *Complete Auto* standard. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614, 615 (1981) (coal severance tax). An exaction that "produces a forbidden effect" on interstate commerce (*Complete Auto*, 430 U.S. at 288) is therefore no less invalid merely because it takes the form of a property tax.

It is indisputable, of course, that property taxation as a general matter is subject to Commerce Clause constraints. Numerous cases, many of which form the backbone of this Court's Commerce Clause jurisprudence,

have involved state property taxes. *E.g.*, *Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (railroad rolling stock); *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962) (railroad freight cars); *Braniff Airways, Inc. v. Nebraska Board of Equalization*, 347 U.S. 590 (1954) (flight equipment of air carrier); *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952) (vessels); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) (vessels); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944) (airplanes); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899) (refrigerated railroad cars).

Those cases establish that a property tax, like any other state tax, must be apportioned where the property is subject to taxation by more than one jurisdiction. "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.'" *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. at 174, quoting *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940).

Property that has a fixed situs can be taxed without apportionment by the state in which it is located, because that state and no other provides "the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership." *Curry v. McCanless*, 307 U.S. 357, 364 (1939). As with a tax on a purely local event—such as the severance of minerals, *Commonwealth Edison Co. v. Montana*, 453 U.S. at 617, or the activity of wholesaling, *Tyler Pipe*, 483 U.S. at 251—apportionment is not required where "no other state has jurisdiction to tax." *Id.*

But apportionment is required when other states do provide benefits sufficient to give them concurrent taxing jurisdiction. In the absence of apportionment, "there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, bene-

fits, or protection which the taxing state gives those operations." *Standard Oil Co. v. Peck*, 342 U.S. at 385.

Not even a domiciliary state is immune from the rule of apportionment. The Court has held, for example, that "tangible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile." *Central R.R. v. Pennsylvania*, 370 U.S. at 612 (emphasis in original). At the same time, however, "the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as is subjected to tax elsewhere." *Id.* at 614 (emphasis in original).

There is every reason to suppose that the internal consistency test, developed in part to expose facially malapportioned or unapportioned state taxes, applies in the case of property taxation. The particular taxes at issue in the Court's recent internal consistency cases have happened to be income or excise taxes. But those categories of taxes have no monopoly on endangering free trade. Nothing in the nature of such taxes, nothing about the internal consistency test itself, and nothing in the Court's application of that test suggests any principled basis for immunizing property taxation from similar scrutiny. If a state tax implicates interstate commerce, and if it cannot survive scrutiny under the internal consistency test, it should be invalidated no matter what form it takes or what label it may have.

One of the cases on which the Florida court relied in suggesting that property taxes deserve special dispensation from normal Commerce Clause constraints was *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). Ironically, that was a property tax case in which the Court applied the internal consistency test, though without calling it by that name. The Court in *Pullman's Palace-Car* upheld an apportioned tax on a

railcar company's capital stock because, 'if' [the tax] were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." *Id.* at 26. There is no question that the Court viewed the tax as a property tax. It stated that "[t]he tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property." *Id.* at 25.

From its very inception, therefore, the inquiry that we have come to call the internal consistency test was applied to a form of property taxation. Property taxes should not now be insulated from the same inquiry merely because the Court has given the test a new name.

B. Nothing About Intangible Property Justifies Depriving It of Ordinary Commerce Clause Protections

The District Court of Appeal, while acknowledging that the state's tax on intangible property "may affect appellant's interstate activities," apparently believed that ordinary Commerce Clause protections do not apply here because the tax "is not integrally related to interstate commerce" and has only an "incidental and indirect effect" on such commerce. J.S. App. 4. But the distinction between "direct" and "indirect" burdens on interstate commerce has had no constitutional significance at least since *Complete Auto*, which made clear that such formalisms no longer control Commerce Clause analysis. The validity of a state tax today depends not on whether it is "integrally" or "peripherally" related to interstate commerce, and not on whether it burdens that commerce "directly" or "indirectly," but on whether it has the impermissible effect of interfering with free trade among the states. The internal consistency test is one important measure by which to detect such interference, and there is nothing about intangible property that warrants a departure from that standard.

The Florida statute defines "intangible personal property" to mean "all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents." Fla. Stat. § 199.023(1). As this Court has stated, intangibles are "rights which are not related to physical things"; they "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts." *Curry v. McCannless*, 307 U.S. 357, 365-66 (1939). Consequently, "[t]he power of government over [intangibles] and the protection which it gives them" can be exerted "only through control over and protection afforded to those persons whose relationships are the origin of the rights." *Id.* at 366.¹¹

Intangible property rights can arise out of interstate commerce and often have an inherently interstate character. When a company like Ford finances the sale of a vehicle to a Florida automobile dealer at an assembly plant in Georgia, the "persons whose relationships are the origin of the [intangible property] rights" (*Curry v. McCannless*, 307 U.S. at 366) have connections with several different states, and the flow of capital that gives rise to the intangible plainly crosses state boundaries. It would make little sense to exclude such property from the protective umbrella of the Commerce Clause. If states were free to impose discriminatory tax burdens on intangibles connected with interstate transactions, the result would be not only to restrict the movement of

¹¹ While tangible property is thought of as a "physical thing" and intangible property as a legal relationship between persons (*Curry*, 307 U.S. at 366), some have questioned the distinction. "[T]angible property is worthless when divorced from the set of legally enforceable relationships between persons which give the object value—for example, the landowner's legal right of exclusive possession. . . . To this extent even tangible property is 'intangible.'" *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 990 n.203 (1962).

capital in interstate markets but also to impede the underlying commerce that depends on the availability of such capital.

It is no surprise, therefore, that this Court has assumed that the Commerce Clause applies in full measure to intangibles. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), which struck down as discriminatory New York's transfer tax on securities transactions, the Court extended the protections of the Commerce Clause to "[t]he flow of interstate commerce in securities," a paradigmatic form of intangible property.

Other courts that have addressed the issue directly have concluded without difficulty that "the passage of investment capital across state lines . . . [lies] within the constitutional policy of free trade and competition." *Wilson v. Department of Revenue*, 302 Or. 128, 135, 727 P.2d 614, 618 (1986) (en banc). In that case, which involved the acquisition and disposition of interests in real property outside the taxing jurisdiction, the Supreme Court of Oregon correctly reasoned that, "[b]ecause capital investment is basic to a system of free trade, and because the framers intended to create an area of free trade under the Commerce Clause, a state law keeping investment capital . . . within the state can have a restrictive impact on the capital markets and implicate the Commerce Clause." *Id.* at 135, 727 P.2d at 619.¹²

The same Commerce Clause limitations that protect numerous objects of state taxation—net income, gross

¹² See also *Dominion Nat'l Bank v. Olsen*, 771 F.2d 108, 110-11 (6th Cir. 1985) (Commerce Clause applies to tax on earnings from certificates of deposit issued by out-of-state financial institutions and owned by residents of the taxing state); *Aronson v. Commonwealth*, 401 Mass. 244, 248, 516 N.E.2d 137, 140 (1987) (Commerce Clause applies to tax on interest earned by taxing state's residents on deposits in out-of-state financial institutions), *cert. denied*, 109 S. Ct. 58 (1988).

receipts, tangible property, and the like—should protect intangible property as well. Intangibles are no less exposed to the risk of duplicative state taxation that would obstruct free interstate trade. Because intangibles inhere in legal relationships among persons, a number of states might justly claim that they provide some measure of benefit and protection to any particular intangible and that they are therefore entitled to tax its value. As in the case of tangible property, such as railroad cars or vessels or airplanes, the rule of apportionment should apply to a tax on intangible property whenever more than one state provides benefits and protection sufficient to assert taxing jurisdiction over that property.

This Court has already held that *income* from intangible property is subject to apportionment, and the rationale of its decision strongly implies that an *ad valorem* tax on the intangible property itself must likewise be apportioned. The issue in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), was whether Vermont could tax an apportioned share of Mobil's dividend income from foreign subsidiaries. The company argued that New York, its state of domicile, had the power to tax the dividend income without apportionment and that Vermont's taxation of an apportioned share of the same income subjected the company to duplicative taxation.

The Court disagreed with Mobil's premise. Though the Court assumed that the state of domicile "has the authority to lay some tax on [Mobil's] dividend income as well as on the value of its stock," it could see "no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States." *Id.* at 445-46. Where "the income bears relation to benefits and privileges conferred by several States," "apportionment is ordinarily the accepted method" of taxation. *Id.* at 446.

Under the same principle, state taxes on intangible property should be apportioned "when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction." *Id.* at 445. In those circumstances, where the intangible property "enjoys privileges and protections conferred by" several states (*id.*), apportionment is required to avoid a constitutionally impermissible risk of multiple taxation, the very risk that the internal consistency test was designed to protect against. Thus, while the Court in *Mobil* left open the question whether the state of domicile might validly impose an unapportioned tax on intangible property (*id.* at 446), the rationale of its decision leaves little doubt that a non-domiciliary state has no constitutional basis for doing so.

C. This Court's Due Process Decisions Do Not Override Applicable Commerce Clause Restrictions Against Multiple Taxation

The Florida court was untroubled by the possibility that Ford and other interstate companies might be forced to bear cumulative tax burdens on account of the same intangibles. It believed that, "since [Ford] has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangibles." J.S. App. 3.

That a taxpayer conducts business operations within a state and thereby avails itself of benefits provided by that state does not insulate the state's taxation from scrutiny under the internal consistency test. In *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987), for example, the interstate truckers subject to Pennsylvania's flat taxes plainly "extended [their] activities" to Pennsylvania and "availed [themselves] of the laws of several states." J.S. App. 3. But the taxes were nonetheless condemned

because they imposed on such interstate truckers an impermissible risk of multiple taxation from which intrastate truckers were exempt.

Ford's multistate activities giving rise to its intangible property unquestionably would justify the imposition of apportioned taxation by each of the several states that have taxable connections with that property. The District Court of Appeal mistakenly concluded, however, that Florida, and presumably each of the other states, could freely impose unapportioned taxation on the same intangibles.

That conclusion rests on a misreading of *Curry v. McCannless*, 307 U.S. 357 (1939), and *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942). The issue in both cases was whether a non-domiciliary state had sufficient jurisdictional nexus, under the Due Process Clause, to impose a death tax on the transfer of an interest in intangible property with which the state had some connection. In *Curry*, a Tennessee domiciliary transferred at death the beneficial interest in certain stocks and bonds held by a corporate trustee domiciled in Alabama. In *Aldrich*, a New York domiciliary transferred at death shares of stock in a corporation organized under the laws of Utah. In both cases, the Court held that the domiciliary state did not have exclusive taxing jurisdiction and that a state with connection to the property itself could also tax the transfer.

The Court in *Curry* rested its decision on "the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states." 307 U.S. at 362-63. Likewise, the Court in *Aldrich* ruled that "'jurisdiction to tax' is not restricted to the domiciliary State" and that "[a]nother State which has extended benefits or protection . . . may likewise constitutionally make its exaction." 316 U.S. at 181-82.

In each case, the Court focused only on the question of taxing jurisdiction under the Due Process Clause. Neither case raised any issue of apportionment. Neither presented any question under the Commerce Clause.

Although the Court in *Curry* said that "more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles" (307 U.S. at 368)—a point echoed by the Court's comment in *Aldrich* that "there is no constitutional rule of immunity from taxation of intangibles by more than one State" (316 U.S. at 181)—those statements merely underscore the fundamental precept of taxing nexus. Where an object of taxation has connections with several jurisdictions, each providing the taxpayer with benefits and protections for which it "may constitutionally ask a return" (*id.* at 180), each has legitimate taxing jurisdiction under Due Process principles. Certainly there is no reason to infer from those statements that each state may impose a wholly unapportioned tax under an internally inconsistent taxing scheme.

Because the only issue in *Curry* and *Aldrich* was *whether* a non-domiciliary state could tax the transfer of intangible property, not the *extent* to which the state could tax that event, neither case can fairly be read to imply that a non-domiciliary state like Florida may validly impose an unapportioned tax on intangible property that arises out of interstate commerce and therefore has taxable connections with several states. Those are the circumstances in which Commerce Clause protections come into play and in which the internal consistency test serves the important function of protecting interstate commerce from the discriminatory burdens of unapportioned taxation.

CONCLUSION

The judgment of the District Court of Appeal should be reversed.

Respectfully submitted,

JAMES E. TRIBBLE
BLACKWELL & WALKER, P.A.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

MARK L. EVANS
Counsel of Record
PATRICIA M. LACEY
ANTHONY F. SHELLEY
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Appellant

Of Counsel:

FRANK A. STOCKING
JOHN P. VAN DUSEN
JOHN M. NEBERLE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
(313) 323-0537

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APPENDIX

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**FLORIDA STATUTES
(1983)**

CHAPTER 199

INTANGIBLE PERSONAL PROPERTY TAXES

PART I GENERAL PROVISIONS

(§§ 199.012-199.072)

PART II ASSESSMENT PROCEDURES

(§§ 199.103-199.122)

**PART III ADMINISTRATIVE, COLLECTION,
AND ENFORCEMENT PROCEDURES**

(§§ 199.202-199.292)

PART I

GENERAL PROVISIONS

- 199.012 Short title.
- 199.023 Definitions.
- 199.032 Levy.
- 199.042 Date of delinquency; discounts for early payment.
- 199.052 Returns.
- 199.062 Information reports; companies, corporations, and brokers.
- 199.072 Exemptions.

199.012 Short title.—This chapter shall be known and may be cited as the “Intangible Personal Property Tax Act.”

199.023 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) “Intangible personal property” means all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including but not limited to, the following:

(a) Money, including, without limitation, United States legal tender, certificates of deposit, cashier’s and certified checks, bills of exchange, drafts, the cash equivalent of annuities and life insurance policies, and similar instruments:

1. Held by a taxpayer;
2. Deposited in or with banks or other corporations, institutions, or persons doing a similar type of business;
3. Placed with, deposited with, or entrusted as a shareholder to building and loan associations, savings associations, credit unions, or similar institutions; or
4. Deposited with or held by any person.

(b) All stocks or shares of incorporated or unincorporated companies, business trusts, and mutual funds.

(c) All beneficial interests of residents in trusts.

(d) All notes, bonds, and other obligations for the payment of money.

(e) All condominium and cooperative apartment leases of recreation facilities, land leases, and leases of other commonly used facilities. These leases shall not be valued as other than intangibles.

(f) Excepting any such leasehold estate or possessory interest subject to classification pursuant to § 4(a), Art. VII of the State Constitution, all leasehold estates, or any possessory interests created thereby, in property of the United States, of the state or any of its political subdivisions, or of municipalities, agencies, authorities, and other public bodies corporate of the state, which leasehold estates or possessory interests are undeveloped or predominantly used for residential or commercial purposes and upon which rental payments are due in consideration of such leasehold estates or possessory interests; except that leasehold estates or possessory interests described by § 196.199(7) shall not be included herein.

(2) “Person” means any individual, firm, partnership, joint adventure, syndicate, or other group or combination acting as a unit, association, corporation, estate, trust, business trust, trustee, executor, administrator, receiver, or other fiduciary and includes the plural as well as the singular.

(3) “Taxpayer” means any person liable for taxes imposed under this chapter, any agent required to file and pay any taxes imposed hereunder, the lessee of governmentally owned property as defined in paragraph (1)(f), and the heirs, successors, assignees and transferees of any such person or agent.

(4) “Department” means the Department of Revenue.

(5) “In the state” means within the exterior limits of Florida.

(6) “Beneficial interest” means the ownership of one or more property rights in the principal or income of a trust, whether vested, contingent, or subject to conditions, but it does not mean an interest in trust income only.

(7) “Affiliated group” means one or more chains of includable corporations connected through stock ownership with a common parent corporation which is an includable corporation, providing that:

(a) Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations, excepting therefrom the common parent corporation, is owned directly by one or more of the other includable corporations; and

(b) The common parent corporation owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includable corporations.

As used in this subsection, the term "nonvoting stock" does not include nonvoting stock which is limited and preferred as to dividends.

(8) "Genuine primary security" means the collateral to which the taxpayer, either by law, regulation, or contract, looks first for collection.

(9) "Banking organization" means:

(a) A bank organized and existing under the laws of this state;

(b) A national bank organized and existing as a national banking association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§ 21 et seq., and maintaining its principal office in this state;

(c) An Edge Act corporation organized pursuant to the provisions of § 25(a) of the Federal Reserve Act, 12 U.S.C. §§ 611 et seq., and maintaining an office in this state;

(d) An international bank agency licensed pursuant to the laws of this state;

(e) A federal agency licensed pursuant to §§ 4 and 5 of the International Banking Act of 1978 to maintain an office in this state;

(f) A savings association organized and existing under the laws of this state; or

(g) A federal association organized and existing pursuant to the provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461 et seq., and maintaining its principal office in this state.

(10) "International banking facility" means a set of asset and liability accounts, segregated on the books and records of a banking organization, that includes only international banking facility deposits, borrowings, and extensions of credit as those terms are defined pursuant to § 655.071(2).

(11) "International banking transaction" means:

(a) The financing of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible personal property or services;

(b) The financing of the production, preparation, storage, or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad;

(c) The financing of contracts, projects, or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust, or other lien upon real property located in the state;

(d) The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage, deed of trust, or other lien upon real property located in the state; or

(e) Entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraph (d).

(12) "Abroad" means in one or more foreign nations, or in the colonies, dependencies, possessions or territories

thereof or of the United States or the Commonwealth of Puerto Rico.

199.032 Levy.—There is hereby levied, to be assessed and collected as provided by this chapter:

(1) An annual tax of 1 mill on the dollar of the just valuation of all intangible personal property, except money as defined in § 199.023(1)(a), and except notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state;

(2) A nonrecurring tax of 2 mills on the dollar of the just valuation of all notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state.

(3) When notes, bonds, and other obligations for the payment of money are secured by personalty, taxable as provided for in subsection (1), and are also secured by real property, taxable as provided for in subsection (2), the taxpayer may elect to be taxed under subsections (1) and (2) hereof, and the tax shall be apportioned, based upon the value of the genuine primary security.

199.042 Date of delinquency; discounts for early payment.—

(1)(a) All annual taxes on intangible personal property shall be due and payable so as to be received by the department by June 30 of each year and shall be delinquent on and after July 1 of each year. However, no return to the department shall be considered delinquent when said return is postmarked not later than the 30th day of such month. If June 30 falls on a Saturday, Sunday, or a federal or state holiday, no return postmarked or delivered to the department on the first workday immediately following such date shall be considered delinquent.

(b) The full amount of the taxes shown on any return required under this chapter shall accompany the return at the time of its filing. On all payments, discounts for early payment thereof shall be allowed as follows:

1. For payment in April or prior thereto, 4 percent;
2. For payment in May, 2 percent;
3. Tax payments made in June shall be without discount.

(2) All intangible taxes on notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state shall be due and payable when the instrument is recorded or sought to be enforced.

199.052 Returns.—

(1) It is hereby made the duty of every person in the state, and every person who has become a legal resident of the state on or before January 1, who owns or has control, management, or custody of intangible personal property which is subject to annual taxation under this chapter to file a sworn return with the department on or before June 30 of each year, listing separately the character, description, location, and just valuation of all such property. This subsection applies to any person, regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state.

(2) No taxpayer subject to the annual tax imposed by this chapter shall be required to file a return or pay a tax thereunder if the aggregate annual tax upon the taxpayer's intangible personal property for any year is less than \$5. However, a banking organization claiming the exemption provided in § 199.072(4) shall be required to file a return regardless of the tax liability of the organization. Agents and fiduciaries shall report for each person

for whom they hold intangibles if the aggregate annual tax on each person is more than \$5.

(3) Husband and wife may file a joint return listing all intangible personal property held jointly or singly by them, and they shall be jointly liable for the payment of all taxes due under this chapter. Husband and wife filing jointly shall be entitled to two exemptions as provided in § 199.072(3).

(4) The beneficial interest of a resident of Florida in a foreign trust shall be returned by the resident unless the trustee returns the resident's beneficial interest for taxation. Any foreign trustee may return the full value of the principal of the trust for taxation, in which event the owners of all beneficial interests in the trust shall not be required to return such interests.

(5) An affiliated group of corporations shall have the privilege of making a consolidated return. The making of a consolidated return shall be upon the condition that all includable corporations which are members of the affiliated group consent to be included in said return. The making of a consolidated return shall be considered as such consent; however, the making of a consolidated return shall not operate to provide taxable situs for intangibles held by an includable corporation when the intangibles would not otherwise be required to be returned for taxation. The fact that members of an affiliated group own stock in corporations which do not qualify under the stock ownership requirements as members of an affiliated group will not preclude the filing of a consolidated return on behalf of the qualified members. In the case of consolidated returns, intercompany accounts, including the capital stock of an includable corporation other than the parent, owned by another includable corporation, shall not be subject to taxation under this chapter. However, capital stock and other intercompany accounts of a nonqualified member of the affiliated group shall be returned and taxed. Each corporation filing a

consolidated return shall submit therewith a separate balance sheet, which shall properly identify and separately state all intercompany accounts, for each company included therein.

(6) The tax imposed on intangible personal property reported and paid by a trustee under subsection (1) or subsection (4), as agent, shall not be returned by the person owning, or having a beneficial interest in, such property.

(7) (a) Every person who shall take, receive, or record any note, bond, or other obligation for the payment of money which is secured by mortgage, deed of trust, or other written specific lien in the nature of a mortgage upon real property situated in the state shall pay the tax prescribed by this chapter in respect to the debt or obligation secured thereby to the clerk of the circuit court at the time the instrument is presented for recordation or, if not so presented, at the time of execution. In evidence thereof, the clerk of the circuit court, upon receiving payment thereof, shall place on such instrument a notation showing the amount of tax levied by this chapter and received by him.

(b) Any mortgage, deed of trust, or other lien given to replace a defective mortgage, deed of trust, or other lien, covering the identical real property as the original and securing identical original note or obligation, may be recorded without payment of additional tax upon proof of payment of the tax upon the original recording. The clerk shall place a notation on the new mortgage, deed of trust, or other lien showing that the tax has been paid on the original recording.

(c) No mortgage, deed of trust, or written evidence of a specific lien in the nature of a mortgage on real property shall be recorded in any public record of the state or be enforceable in any court of the state unless and until the tax levied by this chapter has been paid and until the

notation of the clerk of the circuit court has been placed thereon showing the payment of the tax. However, the failure to place the notation thereon or to pay the correct amount of tax shall not affect the constructive notice given by the recordation of the mortgage, deed of trust, or instrument evidencing a lien. However, the provisions of this chapter do not apply to the assumption of a mortgage agreement between the mortgagor and his grantee when the amount of the indebtedness remains the same, whether or not the original obligator is released from liability on the note and mortgage.

(d) If the mortgage, deed of trust, or other lien subject to the tax levied by this chapter secures future advances, as provided in § 697.02, the tax shall be paid at the time of execution on the initial debt or obligation secured, excluding future advances; at the time and so often as any future advance is made, the tax shall be paid on all sums then advanced. Any increase in the amount of original indebtedness caused by interest accruing under an adjustable rate note or mortgage having an initial interest rate adjustment interval of not less than 6 months shall, however, be taxable as a future advance only to the extent such increase is a computable sum certain when the document is executed. The trustee under any such deed of trust or the owner of any such mortgage or other instrument evidencing such lien making any such advance shall pay the tax prescribed in this chapter in respect to the amount of the advance; and the clerk shall place a notation on the record of the mortgage, deed of trust, or other instrument evidencing such lien, or upon any supplemental instrument evidencing such advance and offered for recording, showing the amount of tax received by him. Failure to pay the tax shall not affect the lien for any such future advance given by § 697.04, but any person who fails or refuses to pay such tax due by him is guilty of a misdemeanor and upon conviction shall be fined accordingly. The mortgage, deed of trust, or other instrument shall

not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.

(e) The clerk of the circuit court shall, on or before the 20th day of each month, transmit to the department all intangible taxes collected by him during the preceding month, together with a list of all instruments upon which the tax was paid.

(8) Every banking organization otherwise required to file a return under this chapter shall certify to the department the character, description, location, and just valuation by category of all intangible personal property issued in or arising out of international banking transactions and owned by such banking organization.

(9) (a) Filing returns or paying all or any portion of tax as shown on the return after the due date shall require a delinquency penalty of 5 percent for each month, or portion thereof, on the amount of tax delinquent but not to exceed 25 percent of the total tax levied against the property covered by that return.

(b) If any amount of tax imposed by § 199.032(1) is not paid on or before the date prescribed for payment of such tax, determined without regard to any extensions, interest of 12 percent per year on the unpaid amount shall be paid from such date to the date of payment. Interest prescribed by this paragraph on any tax shall be deemed assessed upon the assessment of the tax to which such interest relates and shall be collected and paid in the same manner as taxes.

(c) Property omitted from any return shall require, in addition to the delinquency penalty, a specific penalty of 15 percent of the tax attributed to the omitted property.

(d) Property undervalued shall require a specific penalty of 15 percent of the tax attributed to the undervaluation.

(e) The department may settle or compromise such interest or penalties pursuant to § 213.21.

(10) Stock held in margin accounts in other than a fiduciary relationship shall be reported and the tax thereon paid by the customer purchasing the same, but under no circumstances shall the security broker from whom the stock is purchased be required to report or pay the tax on said margin accounts.

199.062 Information reports; companies, corporations, and brokers.—

(1) Every company or corporation, including financial institutions, qualified to do business in this state, domestic or foreign, shall file with the department, on or before June 30 of each year, a report of all its registered Florida stockholders as of December 31 of the previous year, except that no report is required under this subsection:

(a) If the security is not taxable under this chapter;

(b) If the company has paid any dividend during the previous year on the class of security held by the Florida stockholder;

(c) If the company has exercised the election to pay the tax as agent for its Florida stockholders under subsection (3); or

(d) If there are no Florida stockholders.

(2) The report shall be on forms prescribed or approved by the department and shall include the name, address, and social security or federal employer identification number of each Florida stockholder, the number and class of shares held by each Florida stockholder, the just value of each class on January 1 of the tax year, and such other information as may be reasonably required by the department.

(3)(a) Every company or corporation, including financial institutions, qualified to do business in this state,

domestic or foreign, shall have the election each tax year to pay the intangible tax on any class of its stock, as agent for its Florida stockholders, and be relieved of the duty to file the report of registered Florida stockholders for any such class of stock for the tax year required under subsection (1).

(b) The election shall be affirmatively exercised by the company or corporation by filing written notification of the election with the department on or before June 30 each year on forms prescribed by the department by rule. In addition, a company or corporation exercising this election shall furnish its Florida stockholders with written notice, on or before April 1 of each year, that the company or corporation as agent has exercised the election to pay the tax on the class or classes of stock for the year. A company exercising this election shall certify on the notification filed with the department that its shareholders were notified by April 1 of the election by the company to pay as agent.

(c) If the company or corporation fails to notify the department of its election to pay the tax as agent, the election shall not be valid, regardless of any notification provided stockholders; and the company or corporation shall be required to file the report for all its Florida stockholders under subsection (1), regardless of any exception in subsection (1).

(d) Once a company or corporation has exercised the election under this section, the election for the tax year may not be amended or revoked and shall be binding on the company for the tax year. However, such election shall not be binding for other tax years.

(4) All security brokers registered under the laws of Florida shall file with the department, on or before June 30 of each year, a position statement as of December 31 of the preceding year for each customer whose mailing address is within the state. Such statement shall include

the customer's name, address, social security number or federal identification number, the number and description of all securities held for the customer, and such other information as the department may reasonably require.

(5) In order to provide for uniform reporting, every company or corporation qualified to do business in this state shall:

(a) On or before April 1 of each year notify its Florida stockholders of record as of December 31 of the preceding year of the just value on January 1 of each class of its stock which is not regularly listed on any of the public stock exchanges or which is not regularly traded over the counter. Such notification is required when a class of stock is regularly listed or regularly traded over the counter and the shares are subject to restrictions and the value reportable by the stockholder is less than the published price. Values determined by a company or corporation shall not be binding on the department. In the event the department determines the stock is undervalued, it shall proceed to assess and collect from each person subject to tax the amount of tax, penalty, and interest due on such shares based on the correct value.

(b) On or before June 30 of each year:

1. Furnish the department with written notification of any of its shares which are not taxable under this chapter.

2. Furnish the department with written notification of the fact that the company or corporation has paid a dividend during the previous calendar year to the holders of any class of its stock.

3. Furnish the department with written notification in the event that there are no Florida stockholders for all classes of its stock.

4. File with the department the valuation information required under paragraph (a), along with certification that its Florida shareholders were furnished the required information by April 1.

(6) (a) Failure to file the reports required by subsection (1) or subsection (4) within the time required shall subject the company, corporation, or broker to a penalty. The penalty shall be the lesser of \$10 for each Florida stock holder record or Florida customer record, as the case may be, not timely filed, or \$100 plus \$50 for each month or portion thereof from the date due until satisfactory filing with the department.

(b) Failure to file the notifications required by paragraph (5) (b) shall subject the company or corporation to a penalty of \$100.

(c) Such penalties shall be assessed and collected in the same manner as other penalties imposed by this chapter. The department may waive or compromise such penalties under the provisions of § 213.21.

(7) (a) The department is specifically authorized and empowered, after making written request, to examine at all reasonable hours all books, records, and other documents relating to the reports of companies, corporations, and brokers charged with the duty to file reports or make reports required in this section.

(b) In the event that a company, corporation, or broker refuses to permit examination of such records by the department, the department shall have the right to proceed in any circuit court against such company, corporation, or broker to seek a mandatory injunction or other appropriate remedy to enforce its right, as granted by this section, to require examination of such records. If the injunction or other appropriate remedy is granted, the court may order the company, corporation, or broker to pay the costs of such legal action and the cost of the subsequent examination by the department.

(8) The companies, corporations, and brokers subject to the provisions of this section shall keep and preserve all books, records, and documents relating to the information reported under this section for a period of 3 years from June 30 of each tax year.

199.072 Exemptions.—

(1) The following intangible property shall be exempt from the tax imposed by this chapter:

(a) Property owned by the state or any political subdivision or municipality thereof, except that any leasehold estate or possessory interest which is defined by § 199.023(1)(f) and upon which rental payments are due in consideration of such leasehold estate or possessory interest shall be subject to the tax imposed by this chapter;

(b) Franchises;

(c) Any interest in a partnership, either general or limited; it is declared to be the legislative intent that this paragraph is an interpretation of the prior law and that the provisions of this chapter are not intended to tax any interest of a partner in a partnership;

(d) Bonds of the several municipalities, counties, and other taxing districts of the state¹ and bonds of the United States Government and its agencies;

(e) Intangible personal property held in trust pursuant to any employee welfare or benefit plan which is qualified under § 401, United States Internal Revenue Code, 1954;

(f) Notes and other obligations, except bonds, to the extent that such notes and obligations are secured by mortgage, deed of trust, or other lien upon real property situated outside the state; and

(g) The assets of a corporation registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1-52, as amended.

(2)(a) There shall also be exempt from the tax imposed by this chapter intangible personal property owned by nonprofit religious, nonprofit educational, or nonprofit charitable institutions.

(b) The provisions of this subsection authorizing exemptions from tax for religious, educational, and charitable institutions shall be strictly defined, limited, and applied in each category as follows:

1. "Religious institutions" means churches and ecclesiastical or denominational organizations, or established physical places for worship in this state at which nonprofit religious services and activities are regularly conducted and carried on and also means church cemeteries.

2. "Educational institutions" means state tax-supported or parochial, church, and nonprofit private schools, colleges, or universities conducting regular classes and courses of study required for accreditation by, or membership in, the Southern Association of Colleges and Secondary Schools, Department of Education, or the Florida Council of Independent Schools. Nonprofit libraries, art galleries, and museums open to the public are defined as educational institutions and are eligible for exemption.

3. "Charitable institutions" means only nonprofit corporations operating physical facilities in Florida at which are provided charitable services, a reasonable percentage of which shall be without cost to those unable to pay, and those institutions qualified as charitable under § 501(c)(3), United States Internal Revenue Code, 1954.

(c) Property owned by such exempt institutions shall not include intangible personal property held in trusts of any kind over which the institution has no interest in the trust principal except the right to compel the performance of the trust agreement.

(3) There shall be allowed to every taxpayer who is a natural person an exemption of the first \$20,000 of prop-

erty subject to the taxes imposed by § 199.032(1). Agents and fiduciaries filing as such shall not be entitled to claim the exemption afforded hereby in their own right or on behalf of their principals or beneficiaries. When any property is held by an agent or fiduciary, a principal or beneficiary may file a return, and the exemption afforded hereby may be claimed by such principal or beneficiary on his return. No taxpayer shall be entitled to more than one exemption as provided by this section. The exemption provided in this subsection shall not be applicable to that intangible personal property described in § 199.023(1)(f).

(4) All intangible personal property issued in or arising out of any international banking transaction and owned by a banking organization shall be exempt from the tax imposed by § 199.032(1).

PART II

ASSESSMENT PROCEDURES

199.103 Basis of assessment.

199.112 Business situs.

199.122 Valuation.

199.103 Basis of assessment.—The department shall assess all intangible personal property subject to the annual tax imposed by this chapter at its just valuation as of January 1 of each year.

199.112 Business situs.—

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless

of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.

(2) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale of services in this state by any person representing business interests in this state that may claim domicile elsewhere are subject to taxation under this chapter; and such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid.

199.122 Valuation.—Intangible personal property shall be valued in the following manner:

(1) Shares of stock of corporations regularly listed on any stock exchange or regularly traded over the counter shall be valued at their closing prices on the last business day of the previous calendar year.

(2) Bonds regularly listed on any stock exchange or regularly traded over the counter shall be valued at their closing bid prices on the last business day of the previous calendar year.

(3) Shares of stocks, bonds, or similar instruments of corporations not listed on any stock exchange or not regularly traded over the counter shall be valued in ac-

cordance with generally accepted accounting principles which take into account those factors customarily considered in determining intrinsic value.

(4) The blockage rule or discount theory shall have no effect on valuation of shares of stocks as defined herein.

(5) Accounts receivable shall be valued at their face value less a reasonable allowance for uncollectible accounts.

(6) All notes and other obligations shall have a value equal to their unpaid balance as of January 1 of each year, unless the taxpayer can establish a lesser value upon proof satisfactory to the department.

(7) All notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state shall be valued at the principal amount of indebtedness evidenced by such obligation. A note, bond, or other obligation for payment of money secured by mortgage, deed of trust, or other lien on real properties situated both in and out of this state shall be valued at that portion of the principal amount of the indebtedness evidenced by such obligation which the value of the Florida real property securing the obligation bears to the total value of all real property securing the obligation at the time the document evidencing the obligation is executed.

(8) All other forms of intangible personal property shall be valued in accordance with generally accepted accounting principles which take into account those factors customarily considered in determining intrinsic value.

PART III

ADMINISTRATIVE, COLLECTION, AND ENFORCEMENT PROCEDURES

- 199.202 Administration of law; rules and regulations.
- 199.212 All state agencies to cooperate in administration of law.
- 199.222 Destruction of returns by department.
- 199.232 Powers of department.
- 199.252 Refunds.
- 199.262 Tax liens and garnishment.
- 199.272 Suits for violation of this chapter, jurisdiction and service.
- 199.282 Punishment for violation of this chapter.
- 199.292 Disposition of intangible personal property taxes; appropriations for expenses of assessment and collection; county sharing.

199.202 Administration of law; rules and regulations.—

(1) The cost of preparing and distributing the reports, forms, and paraphernalia for the collection of the tax imposed by this chapter and expenses of the inspection and enforcement duties required herein shall be borne by the revenue produced by this chapter.

(2) The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. It is authorized to make and publish such rules and regulations not inconsistent with this chapter as it may deem necessary to administer and enforce the provisions of this chapter.

(3) Penalties as provided in this chapter, unless waived or compromised by the department, shall be assessed and

collected in the same manner as the tax levied by this chapter.

199.212 All state agencies to cooperate in administration of law.—The department is empowered to call on any state, county, or municipal agency, department, bureau, or board for any and all information which may, in its judgment, be of assistance in administering, or preparing for the administration of, this chapter, and such state, county, or municipal agency, department, bureau, or board is hereby authorized, directed, and required to furnish such information.

199.222 Destruction of returns by department.—It shall be the duty of the department to destroy all intangible personal property tax returns filed with the department 4 years after the tax with respect to the return has been paid.

199.232 Powers of department.—

(1) The department shall ascertain by diligent search and inquiry whether all persons as defined in this chapter have made proper returns and whether all intangible personal property subject to taxation has been assessed. If the department discovers that any intangible personal property has for any reason escaped taxation or has been undervalued, it shall assess the same separately for each year that the property may have escaped taxation or has been undervalued, and the tax and penalties shall be levied and collected by the department.

(2) Upon discovery of any person that the department has reason to believe should have filed a return but who failed or refused to do so, the department may require that person to file completed returns for all years under investigation, including the current year. The total tax and penalties accrued to the date of payment must accompany such returns. On receipt of such returns, the department, using available information, shall

ascertain if any intangible personal property has either been omitted or undervalued. Upon discovery that intangible personal property was either omitted or undervalued, the department shall assess such property at the rate and in the manner as provided in this chapter.

(3) If, upon examination of returns that have been filed, the department has reason to believe that any intangible personal property has been omitted or has been undervalued, it may require the person filing the return to produce the books, records, and documents deemed necessary by the department to discover omitted property or to determine the just values of all listed or omitted property.

(4) The department is authorized to audit or inspect the books, records, or documents of persons and correct by credit or refund any overpayment of tax, and, in the event of a deficiency, an assessment of such deficiency shall be made and collected. No assessment shall be made, except pursuant to an investigation, after the expiration of 3 years from the due date for filing a return or the date of filing, whichever is later.

(5) (a) In the event any person charged herein:

1. Fails or refuses to make his books, records, or documents available for inspection, so that no audit or examination can be made of the books and records of such person; or

2. Fails to make a return and pay the tax as provided by this chapter; or

3. Makes a grossly incorrect return; or

4. Makes a return that is false and fraudulent,

it shall be the duty of the department to make an assessment from an estimate based on the best information then available to it for the taxable period, together with penalties if such have accrued.

(b) The department shall proceed to collect such taxes and penalties, if such have accrued, on the basis of such assessment, which shall be considered *prima facie* correct. The burden to show the contrary shall rest upon the person so assessed.

(6) It shall be the duty of every person required to make a return and pay tax under this chapter to keep and preserve suitable records of intangible personal property and such other books and documents as may be necessary to determine the amount of the tax due hereunder and other information as may be required by the department. It shall be the further duty of every such person so charged to keep and preserve, for the same 3-year period in which a refund would be allowed or the same 3-year period as prescribed herein for the time an assessment may be made by the department, all such records as may be required by the department for the reasonable administration of this chapter; and all such records shall be open to examination at all reasonable hours by the department or any of its duly authorized agents.

(7) An investigation may be made against a person for any year in which that person's right to a refund is available. The date a taxpayer is contacted personally by an agent of the department, or the date of a certified letter from the department to the last known address of the taxpayer, shall be the date that will govern the period subject to assessment.

(8) After an investigation has been completed and a deficiency is found to be due, the taxpayer shall be notified in writing, either by delivery or by certified mail at his or its last known address, of the amount of tax and penalty due. Full payment for the total amount shall be made by the taxpayer to the place designated and within the time specified in such notice.

(9) The department shall have the power to issue subpoenas to compel the attendance of witnesses and the pro-

duction of documents, papers, books, records, and other evidence before it in any matter over which it has jurisdiction under this chapter. Any duly authorized representative of the department shall have the power to administer oaths and affirmations to any person.

(10) If any person shall refuse to obey any such subpoena, to give testimony, or to produce evidence as required thereby, any judge of a circuit court having jurisdiction over that person may, upon application of the department showing such failure and refusal to comply, make and issue such orders as may be necessary to secure the compliance of such person.

199.252 Refunds.—

(1) Any person or his heirs, personal representatives, or assigns shall be entitled to a refund of any tax or penalty levied under this chapter, whether payment was made voluntarily or involuntarily, which should not have been paid. No refund shall be allowed unless proper application has been made and delivered to the department for approval within 3 years from the date the right to such refund shall have accrued.

(2) When a bona fide controversy exists between the department and a taxpayer as to the liability of the taxpayer for the payment of the tax claimed to be due, the taxpayer may pay the amount claimed by the department to be due, or such lesser amount as may be fixed by a court of competent jurisdiction, and, if it is finally adjudged by a court of competent jurisdiction that the taxpayer was not liable for the payment of taxes and penalties, or any part thereof, the Comptroller shall make such refund as the court may direct.

199.262 Tax liens and garnishment.—

(1) When any tax imposed by this chapter becomes delinquent, or is otherwise in jeopardy, it shall be the duty of the department to issue a warrant for the full

amount of tax due or estimated to be due, together with penalties and cost of collection. Such warrant shall be directed to all and singular the sheriffs of the state and shall be recorded with the clerk of the circuit court in the county where the delinquent taxpayer's property is located. Upon recording, the amount of such warrant shall become a lien upon the taxpayer's real or personal property in such county in the same manner as a judgment duly docketed and recorded, and the clerk of the circuit court shall issue execution thereon the same as on a judgment. The sheriff shall thereupon proceed in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgment of the circuit court, and he shall be entitled to the same fees for his services in executing the warrant. Upon payment of such execution, warrant, or judgment, the department is authorized and directed to satisfy the lien of record within 30 days; and any interested person may thereafter compel the department to satisfy the lien of records.

(2) Whenever it becomes necessary in the judgment of the department, it may issue an alias tax execution or tax executions which, however, shall be so designated on the face of the tax execution. Any such alias tax execution shall have the same force and effect as the original.

(3) Tax executions shall have the same force and effect as a writ of garnishment when levied upon any person, firm, or corporation that shall have any goods, moneys, chattels, or effects of the delinquent taxpayer in its hands, possession, or control or that shall be indebted to such delinquent taxpayer. When any tax execution is so levied upon any debtor or person holding property of the taxpayer, such debtor or person shall pay the debt or deliver the property of the delinquent taxpayer to the department or an authorized agent of the department levying such writ, and the receipt of the department or an authorized agent of the department shall be complete

discharge to that extent of the debtor or person holding such property.

(4) Any employee of the department designated in writing by the executive director of the department is authorized to make and sign assessments, tax warrants, assignments of tax warrants, and satisfactions of tax warrants.

(5) Whenever any tax execution issued under the provisions of this chapter or any previous law providing for the administration of intangible personal property tax becomes void by virtue of the expiration of any statute of limitations or otherwise, the department or any tax collector or other officer having official custody of the pertinent records shall have authority to cancel the same of record and shall do so upon the request of any interested person. Such cancellation shall be recorded by the clerks of the courts.

199.272 Suits for violation of this chapter; jurisdiction and service.—

(1) All suits brought hereinafter by the department against any person defined in this chapter for any violation of this chapter and for the purpose of effecting collection of any tax due from any person, including garnishment proceedings, regardless of the amount, shall be brought thereon in the circuit courts of this state having jurisdiction of the subject matter.

(2) Every person having his principal place of business outside of this state but subject to the provisions of this chapter shall designate with the department an agent for service within the state for the purpose of enforcing this chapter. If such person has not designated an agent, the Department of State shall be deemed the agent for service, or any agent or employee of the person within the state shall be deemed agent for service.

199.282 Punishment for violation of this chapter.— Any person willfully failing or refusing to comply with this chapter or violating any of the provisions hereof shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

199.292 Disposition of intangible personal property taxes; appropriations for expenses of assessment and collection; county sharing.—

(1) All intangible personal property taxes levied, assessed, and collected under and pursuant to this chapter shall be promptly remitted by the clerk of the circuit court or, during the implementation period, by the tax collector to the Department of Revenue, to be placed in a special fund designated as the "Intangible Tax Trust Fund." The amount collected by the Department of Revenue shall also be deposited in the Intangible Tax Trust Fund. Revenues derived from the intangible personal property tax on property defined by § 199.023(1)(f) shall be returned to the local school board in the county from which the revenue was derived.

(2) There is hereby appropriated annually out of the Intangible Tax Trust Fund the amount necessary for the effective and efficient performance of the duties, services, functions, and enforcement by the department of the provisions of chapters 192, 193, 194, 195, 196, 197, and 198 and this chapter and for the fees of the county property appraisers and tax collectors allowed them by the law for the assessment and collection of intangible personal property taxes. It shall be the duty of the department to pay from the Intangible Tax Trust Fund these costs and fees.

(3) The department shall pay from the Intangible Tax Trust Fund the entire cost of all forms, books, and records of any type required by law to be furnished each county or county officer by the Department of Revenue; and a sum sufficient to pay therefor is hereby annually appropriated out of the Intangible Tax Trust Fund.

(4) An amount equal to 55 percent of the total net intangible taxes collected shall be transferred to the Revenue Sharing Trust Fund for Counties in the month following collection. The remaining balance of net collections from this tax shall be transferred to the General Revenue Fund of the state. For the purposes of this law, "net collections" means the total amount collected less a pro rata share of all costs as provided in subsections (2) and (3).

(5) The distribution of these amounts shall be made quarterly in the months of September, December, March, and June and shall include the net collections through the end of the month preceding the distributions thereof.

QUESTION PRESENTED

Whether Florida's intangible property tax on appellant's accounts receivable having a legitimate business situs in Florida is invalid under the Commerce Clause by virtue of the "internal consistency" test.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	5
A. Florida's Intangible Property Tax	5
B. This Litigation	9
1. Facts	9
2. Proceedings	12
INTRODUCTION AND SUMMARY OF ARGUMENT	14
ARGUMENT	19
I. THE BUSINESS SITUS INTANGIBLE PROPERTY TAX IMPOSED ON FORD IS VALID UNDER THE COMMERCE CLAUSE	19
A. Nexus and Fair Relation	19
B. Fair Apportionment	20
C. Discrimination	25
II. THE INTERNAL CONSISTENCY TEST SHOULD NOT BE EXTENDED TO INVALIDATE FLORIDA'S BUSINESS SITUS TAX BASED ON THE HYPOTHETICAL ADOPTION BY A DIFFERENT STATE OF A DIFFERENT TAX IMPOSED ON A DIFFERENT BASIS	25
A. This Court Has Never Applied The Internal Consistency Test In Circumstances Like The Present	27

TABLE OF CONTENTS—Continued

	Page
B. This Court Should Not Extend The Internal Consistency Test To Invalidate The State Tax At Issue Here	30
1. The Objections To Multiple Taxation That Underlie The Internal Consistency Test Have Been Soundly Rejected In The Present Circumstances	30
2. Extension Of The Internal Consistency Test To This Case Would Be An Inappropriate Tightening Of Commerce Clause Restrictions On State Taxing Authority	34
CONCLUSION	38

TABLE OF AUTHORITIES

Cases	Page
<i>Allis-Chalmers Credit Corp. v. Department of Revenue</i> , 456 So. 2d 899 (Fla. App., 1st Dist.), review dismissed, 458 So. 2d 271 (Fla. 1984)....	6, 26
<i>Amerada Hess Corp. v. Director, Div. of Taxation</i> , 109 S. Ct. 1617 (1989)	19, 20, 27
<i>American Ry. Express Co. v. Levee</i> , 263 U.S. 19 (1923)	3, 4
<i>American Refrigerator Transit Co. v. Hall</i> , 174 U.S. 70 (1899)	22
<i>American Trucking Ass'ns v. Scheiner</i> , 483 U.S. 266 (1987)	passim
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	passim
<i>Ashland Oil, Inc. v. Caryl</i> , 110 S. Ct. 3202 (1990) ..	34
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969)	4
<i>Blackstone v. Miller</i> , 188 U.S. 189 (1903)	23
<i>Boston Stock Exchange v. State Tax Comm'n</i> , 429 U.S. 318 (1977)	23, 37
<i>Braniff Airways, Inc. v. Nebraska State Bd. of Equalization</i> , 347 U.S. 590 (1954)	22, 32
<i>Central R.R. v. Pennsylvania</i> , 370 U.S. 607 (1962)	22, 32
<i>City of St. Louis v. Prapotnik</i> , 485 U.S. 112 (1988)	2
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	15, 19, 32
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	passim
<i>Container Corp. v. Franchise Tax Bd.</i> , 463 U.S. 159 (1983)	passim
<i>Curry v. McCanless</i> , 307 U.S. 357 (1939)	passim
<i>D.H. Holmes Co. v. McNamara</i> , 486 U.S. 24 (1988)	19, 27
<i>Exxon Corp. v. Wisconsin Dep't of Revenue</i> , 447 U.S. 207 (1980)	16, 23
<i>Florida Steel Corp. v. Dickinson</i> , 308 So. 2d 623 (Fla. App., 1st Dist. 1975), <i>aff'd</i> , 328 So. 2d 418 (Fla. 1976)	9
<i>Florida Steel Corp. v. Dickinson</i> , 328 So. 2d 418 (Fla. 1976)	9

TABLE OF AUTHORITIES—Continued

	Page
<i>Goldberg v. Sweet</i> , 109 S. Ct. 582 (1989)	<i>passim</i>
<i>Lawrence v. State Tax Comm'n</i> , 286 U.S. 276 (1932)	31
<i>Liverpool & L. & G. Ins. Co. v. New Orleans</i> , 221 U.S. 346 (1911)	16, 23
<i>Market St. Ry. v. Railroad Comm'n</i> , 324 U.S. 548 (1945)	3
<i>Metropolitan Life Ins. Co. v. New Orleans</i> , 205 U.S. 395 (1907)	23, 33
<i>Milliken v. Meyer</i> , 311 U.S. 457 (1940)	31
<i>New York ex rel. Cohn v. Graves</i> , 300 U.S. 308 (1937)	17, 31, 33
<i>Norfolk & W. Ry. v. Missouri State Tax Comm'n</i> , 390 U.S. 317 (1968)	22, 23
<i>Northwest Airlines, Inc. v. Minnesota</i> , 322 U.S. 292 (1944)	22
<i>Northwestern States Portland Cement Co. v. Minnesota</i> , 358 U.S. 450 (1959)	22, 35
<i>Ott v. Mississippi Valley Barge Line Co.</i> , 336 U.S. 169 (1949)	22
<i>Pennoyer v. Neff</i> , 95 U.S. (5 Otto) 714 (1877)	31, 32
<i>Pullman's Palace-Car Co. v. Pennsylvania</i> , 141 U.S. 18 (1891)	20
<i>Shaffer v. Carter</i> , 252 U.S. 37 (1920)	17, 31, 33
<i>Standard Oil Co. v. Peck</i> , 342 U.S. 382 (1952)	22
<i>State Tax Comm'n v. Aldrich</i> , 316 U.S. 174 (1942)	<i>passim</i>
<i>Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue</i> , 483 U.S. 232 (1987)	<i>passim</i>
<i>United States Shoe Corp. v. Department of Revenue</i> , 508 So. 2d 1252 (Fla. App., 1st Dist.), review denied, 518 So. 2d 1274 (Fla. 1987)	8
<i>Wheeling Steel Corp. v. Fox</i> , 298 U.S. 193 (1936) ..	12
<i>Statutes, Regulations, and Rules</i>	
28 U.S.C. § 1257(2) (1982)	<i>passim</i>
28 U.S.C. § 2101(c) (1982)	<i>passim</i>
Pub. L. No. 100-352, 102 Stat. 662 (1988)	2

TABLE OF AUTHORITIES—Continued

	Page
9 Del. Code § 8102 (1989)	12
Fla. Stat.	
§ 199.023 (1983)	6
§ 199.032 (1983)	5, 6
§ 199.052(1) (1983)	6, 9
§ 199.103 (1983)	6
§ 199.112(1) (1983)	6, 7, 10, 26
§ 199.175 (1989)	9
Fla. Admin. Code	
§ 12A-1.064(1)	7
§ 12C-2.001(l)	6
§ 12C-2.006(3)(b)	8, 9
§ 12C-2.006(1)	9
Fla. R. App. P.	
9.020(g) (1989)	3
9.120(b) (1989)	3
Mich. Comp. Laws	
§ 205.131(c) (1986)	12
§ 205.132(a) (1986)	12
§ 205.133(b) (12) (1986)	12
Other Authorities	
Bittker, <i>The Taxation of Out-of-State Tangible Property</i> , 56 Yale L.J. 640 (1947)	32
P. Hartman, <i>Federal Limitations on State and Local Taxation</i> (1981)	23, 24
J. Hellerstein & W. Hellerstein, <i>State and Local Taxation</i> (5th ed. 1988)	23, 31
Hellerstein, <i>Is "Internal Consistency" Foolish?: Reflections on An Emerging Commerce Clause Restraint on State Taxation</i> , 87 Mich. L. Rev. 138 (1988)	25
R. Stern, E. Gressman, & S. Shapiro, <i>Supreme Court Practice</i> (6th ed. 1986)	3, 4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 88-1847

FORD MOTOR CREDIT COMPANY,
Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

**On Appeal from the District Court of Appeal
of Florida, First District**

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District (J.S. App. 1-5) is reported at 537 So. 2d 1011. The order of the Supreme Court of Florida declining to exercise its jurisdiction (J.S. App. 21) is reported at 542 So. 2d 988. The final order of the Florida Department of Revenue (J.S. App. 6-20) is not reported.

JURISDICTION

Appellant Ford Motor Credit Company (Ford) asserts jurisdiction over this appeal under 28 U.S.C. §§ 1257(2) and 2101(c) (1982). Appellate jurisdiction is proper in

this case if those provisions apply. In particular, this case involves an appeal challenging the judgment of the Florida District Court of Appeal finding a Florida statute valid under the federal Constitution. 28 U.S.C. § 1257(2) (1982). A notice of appeal to this Court (J.S. App. 21) was filed in the District Court of Appeal on April 5, 1989, within 90 days after the Supreme Court of Florida denied review on February 22, 1989 (J.S. App. 24; J.A. 1). 28 U.S.C. § 2101(c). The appeal was docketed on May 12, 1989, and the Court noted probable jurisdiction on June 11, 1990.

In 1988, however, Congress eliminated mandatory appellate jurisdiction under 28 U.S.C. § 1257(2) (1982), making certiorari the sole means of reviewing state court judgments. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). If that Act applies, this Court does not have appeal jurisdiction. There is a serious question whether Public Law 100-352's elimination of appeal jurisdiction applies to this case. Taking note that this Court has noted *probable* jurisdiction in this case, and that the Court has expressed its reluctance in *certiorari* cases to reconsider a grant of review at the merits stage (see *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988)), we analyze the question of jurisdiction in what follows.

Section 7 of Public Law 100-352 states that the Act "shall not . . . affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before [September 25, 1988]." 102 Stat. 664. The opinion of the District Court of Appeal, First District, was filed on September 13, 1988—before the critical date under Section 7. J.S. App. 1. The order of the Florida Supreme Court denying review was issued on February 22, 1989—after the Section 7 date. J.S. App. 21. Whether Section 7 preserves the appeal right in this case, therefore, turns on whether the District Court of Appeal opinion or the Supreme Court of Flor-

ida order constitutes "the judgment or decree of a court" within the meaning of Section 7.¹

The two obviously relevant statutes that use comparable phrases point in opposite directions. On one hand, if the Section 7 phrase were to borrow its meaning from 28 U.S.C. § 1257, the appeal here would be proper. It has long been held that the state court "judgment[]" or "decree[]" that is "reviewed" under Section 1257 in circumstances like the present is the final state court decision on the merits, even if rendered by an intermediate appellate court, and not the denial of discretionary review by the state supreme court. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923); R. Stern, E. Gressman, & S. Shapiro, *supra*, at 142. On the other hand, if the Section 7 phrase were to borrow its meaning from 28 U.S.C. § 2101(c), the appeal would not be proper. Section 2101(c) states that an appeal bringing "any judgment or decree" in a civil case to the Supreme Court "for review" must be filed within 90 days after "entry of such judgment or decree." The 90-day period does not begin to run in circumstances like the present until the denial of discretionary review by the state supreme court, which is therefore the "judgment or decree" under Section

¹ As noted at the jurisdictional stage in this Court (Motion to Dismiss or Affirm 11-12), there is some doubt whether the District Court of Appeal "entered" a "judgment or decree" (Pub. L. 100-352, § 7) when it "filed" (J.S. App. 1) its opinion on September 13, 1988, because the opinion expressly states that it was not to become final until the expiration of time for (and disposition of) a rehearing motion. J.S. App. 1. Nevertheless, we do not press this construction of Section 7 of Public Law 100-352. Precedent suggests that "entry" occurred for purposes of 28 U.S.C. § 1257. See *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 550-52 (1945); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 311-12 (6th ed. 1986). Moreover, review of the District Court of Appeal decision apparently could have been sought in the Supreme Court of Florida immediately after September 13, 1988, without the filing of any rehearing motion. See Fla. R. App. P. 9.020(g), 9.120(b) (1989).

2101(c). *American Ry. Express Co. v. Levee*, 263 U.S. at 21; R. Stern, E. Gressman, & S. Shapiro, *supra*, at 312.

For several reasons, we think that the better view is that the Section 7 phrase "judgment or decree" refers, like Section 2101(c), to the order of the state supreme court denying review. First, Section 2101(c) seems to provide a stronger analogy than Section 1257 for deciding the meaning of the Section 7 phrase. Like Section 7, Section 2101(c) is a timing provision with concrete, jurisdictional consequences—determining whether this Court has appellate jurisdiction over an appeal filed on a particular date. By contrast, it is essentially a matter of pleading form that, under Section 1257 as it has been construed, an appeal like the present must be identified as taken from the intermediate appellate court rather than from the state supreme court decision.

Second, the specific language of Section 7, which preserves "the right to review" certain state court judgments, points to the same interpretation. Thus, there is no right to ask this Court to review an intermediate appellate court decision until review is sought from the state supreme court (if available) and the state supreme court has spoken. *See, e.g., Benton v. Maryland*, 395 U.S. 784, 786 (1969); R. Stern, E. Gressman, & S. Shapiro, *supra*, at 142. After the state supreme court has spoken, a litigant has a fully ripened right of immediate review; after the intermediate appellate court ruling, the litigant has only a still-partly-inchoate right of eventual review (which would ripen if the state supreme court leaves the intermediate court decision standing). To construe Section 7 as preserving only the former better accords with Section 7's core function—to draw an inherently arbitrary but preferably bright line determining which cases have ripened enough to retain the now-repealed right of appeal.

Finally, the policies that led Congress to abolish mandatory appeal jurisdiction support resolving a close question against retaining such jurisdiction, leaving litigants

in the position of Ford with the option of seeking review by certiorari. Indeed, this case perfectly illustrates why Congress abolished mandatory appeal jurisdiction in favor of permitting this Court to apply its usual standards for deciding whether to grant certiorari. There is no lower court conflict on the Commerce Clause question here; there is, in fact, no other lower court decision even addressing the question. *See* J.S. 8-20. Nor is this particular case inherently important. Ford concedes that there is no actual multiple taxation in this case. Brief for Appellant 23 n.9; *see* note 11, *infra*. Ford also concedes that, as far as the internal consistency test is concerned (which is the only legal claim raised before this Court), Florida may do precisely what it has done in this case, namely, tax the full value of Ford's Florida intangibles—if only Florida ceased taxing the out-of-state intangibles of other taxpayers, namely, Florida domiciliaries. Brief for Appellant 25. In these circumstances, it seems to us that a grant of certiorari would not be warranted. It was precisely to relieve this Court of the obligation to hear such cases that Congress enacted Public Law 100-352. Section 7 of that law should be construed here to further that aim.²

STATEMENT

A. Florida's Intangible Property Tax

During the years at issue in this case (1980-1982), Florida imposed a tax on intangible personal property. Fla. Stat. § 199.032 (1983).³ With specified exceptions,

² Effective September 25, 1988, Section 5(c) of Public Law 100-352 also repealed 28 U.S.C. § 2103 (1982), which directed the Court to treat an improperly filed appeal as a petition for a writ of certiorari. If, however, this Court, in its discretion, were to treat the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied. We note that, at the time it filed its jurisdictional statement, Ford filed a separate petition for a writ of certiorari presenting the same questions. *See* J.S. 2-3.

³ The tax remains in force in much the same form. *See* Fla. Stat. ch. 199 (1989).

the tax applied to most forms of intangible personal property, including loans, accounts receivable, and stock. *Id.* § 199.023. The tax was assessed annually on January 1 and was measured by the value of covered intangible property on that date. *Id.* § 199.103. The rate was one mill—one thousandth, or one tenth of one percent—of the assessed value. *Id.* § 199.032(1). Thus, a loan with a balance of \$10,000 on January 1 would be assessed a tax of \$10.

The subject of this action, which alleges impairment of or discrimination against interstate commerce, is the tax as applied to accounts receivable held by firms in the business of financing the sale, leasing, or servicing of personal property. J.A. 5; J.S. App. 10 (stipulation of facts and chart showing types of intangible property at issue). Florida imposed the tax on “any person, regardless of domicile, who own[ed] or ha[d] management, custody, or control of intangible property that ha[d] acquired a business situs in [Florida].” Fla. Stat. § 199.052(1) (1983). The statute then defined “business situs,” as applied here, to include accounts receivable “arising out of, or issued in connection with, the sale, leasing, or servicing of . . . personal property in the state.” *Id.* § 199.112(1). This intangible tax based on business situs thus applied without regard to whether the taxpayer was a domiciliary or non-domiciliary of Florida. Indeed, the legislature expressly stated that the intent behind the tax was “that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business.” *Ibid.*⁴ See *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d 899, 902 (Fla. App., 1st Dist.), review dismissed, 458 So. 2d 271 (Fla. 1984), citing *Smith v. Lummus*, 149 Fla. 660, 6 So. 2d 625, 628 (1942).

⁴ The terms “domiciliary” and “resident” are interchangeable. Fla. Admin. Code 12C-2.001(1).

The application of the business situs intangible property tax was narrowed to intangibles tied to Florida in three ways important to this case. First, the tax statute specified when a sale was deemed to occur in Florida for purposes of determining whether an account receivable arising out of such a sale was subject to taxation. The statute said: “Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale.” Fla. Stat. § 119.112(1) (1983). Florida interpreted that provision—consistent with the practice under the Florida sales tax (see Fla. Admin. Code § 12A-1.064(1))—as stating not only a sufficient condition but also a necessary condition for application of the business situs tax. That is, if the personal property was delivered or shipped outside Florida as part of the sale—and not merely by the purchaser immediately after sale—then the sale was not treated as having occurred in Florida; and neither a sales tax nor a business situs intangible property tax would arise out of that sale. In short, of the various aspects of a sale, it was delivery—not, for example, title transfer or placement of an order or f.o.b. point—that uniquely determined the place of sale.⁵

Second, Florida did not apply its intangible tax to all receivables arising out of Florida sales as defined. In addition, Florida asked whether the taxpayer itself had a sufficient connection with Florida. A taxpayer’s incorporation in the state or maintenance of its principal place of business, of course, supplied the required connection with the state. For a non-domiciliary, the sufficiency of its nexus with Florida depended on a number of fac-

⁵ Ford’s statement to the contrary relies on appellee’s response to interrogatory 1(a). Brief for Appellant 6. Ford has misread the response, which expressly addresses only the taxability of “legal residents”—i.e., domiciliaries—of Florida. J.A. 18. As noted below, Florida residents are taxed on all of their covered intangibles, without regard to business situs.

tors, including whether the taxpayer operated a permanent business and, if so, whether its in-state agents performed discretionary, i.e., more than merely clerical, functions. See Fla. Admin. Code § 12C-2.006(3)(b); *United States Shoe Corp. v. Department of Revenue*, 508 So. 2d 1252, 1255 (Fla. App., 1st Dist.), review denied, 518 So. 2d 1274 (Fla. 1987); *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d at 902. For example, an isolated sale on credit of a car in Florida by a nonresident who was temporarily in the state would not give rise to a taxable intangible; nor would a nonresident firm's routine sales to Florida purchasers if the selling firm used Florida agents merely to solicit orders but not to make any discretionary decisions. *United States Shoe Corp.*, *supra*.

Third, the business situs tax was imposed on the accounts receivable of covered taxpayers only *as long as* the receivables themselves retained a sufficient connection with Florida, even if the taxpayer retained its business presence generally. For example, with respect to secured car loans such as those involved in this case, the business situs intangible property tax was not imposed if the car (security) and purchaser (debtor) as well as the servicing of the loan all moved outside Florida—even if the financing company (taxpayer) continued its overall operations in Florida.⁶ There was no formula for determining when an intangible lost its nexus to Florida, and there are no definitive rulings on whether the tax was imposed when the security or the debtor or the servicing of the intangible, but not all three, moved out-

⁶ "Servicing" in a state means—using the definition offered by Ford when it defined that term for its interrogatories—that the individual with the authority to sell, pledge, or hypothecate the intangible, or to enforce or refrain from enforcing the rights of the obligee, and the responsibility for exercising stewardship over the intangible, is located in that state. See Letter from Neal B. Shniderman to J.C. O'Steen (Oct. 17, 1986).

side Florida.⁷ Rather, consideration was required of the various ways in which the particular intangible—through its management or investment in Florida, its use in a Florida business, its being secured by Florida property, or its other relation to Florida—continued to take advantage of Florida laws, courts, and benefits. See Fla. Admin. Code § 12C-2.006(3)(b).⁸

Business situs was the only basis for imposing intangible property taxes on the accounts receivable of non-domiciliaries (like appellant Ford). Florida domiciliaries, however, were subject to additional intangible property taxes. Unlike nonresidents such as Ford, Florida domiciliaries also paid an intangible property tax of 1 mill on the value of their covered intangibles (on January 1), including accounts receivable, without a business situs in Florida. Fla. Stat. 199.052 (1983); Fla. Admin. Code § 12C-2.006(1). This domiciliary intangible tax on out-of-state intangibles was due on all such intangibles, regardless of whether they were subject to another state's intangible tax based on business situs. Fla. Admin. Code § 12C-2.006(1); *Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976); *Florida Steel Corp. v. Dickinson*, 308 So. 2d 623, 624 (Fla. App., 1st Dist. 1975), *aff'd*, 328 So. 2d 418 (Fla. 1976).

B. This Litigation

1. *Facts.* The stipulated facts on which the case comes to this Court (J.A. 2-12) show that the intangibles at issue—accounts receivable owned by appellant Ford, which is not a domiciliary of Florida—fall squarely under Florida's business situs intangible property tax. Dur-

⁷ The position of the Department of Revenue has been that an account receivable remained subject to the business situs tax if the servicing remained in Florida, even if the debtor and security left the State. See J.A. 18 (response to interrogatory 1(c)).

⁸ Much of the foregoing description of the business situs intangible property tax is now codified at Fla. Stat. § 199.175 (1989).

ing the years in question (1980-1982), Ford had a substantial presence in the state, operating a number of permanent branch offices, with several hundred employees, that handled the business of financing wholesale and retail sales of Ford Motor Company automobiles to Florida dealers and consumers (as well as certain other financing operations). J.A. 4. There is no dispute here that all of the accounts receivable at issue arose out of the sale, leasing, or servicing of personal property in Florida, within the meaning of Fla. Stat. §199.112(1) (1983). Nor is there any dispute here that, subsequent to their origination in Florida, the accounts receivable at issue retained their required nexus to Florida through, for example, the servicing of the intangibles, the presence of the security, and the presence of the debtors. In particular, most of the accounts receivable at issue arose out of sales of automobiles delivered to or located in Florida and involved debtors residing in Florida. J.A. 4.

Receivables growing out of retail sales had numerous contacts with Florida. To begin with, the Court should assume—because there is no allegation or stipulation to the contrary—that all of the retail accounts receivable arose out of sales by Florida dealers of automobiles delivered in Florida. *See* J.A. 8-12. As to financing, when a dealer sold a car, Ford “actively competed with local banks to provide financing.” J.A. 11. A Florida branch of Ford would consider whether to accept financing and, if so, pay the dealer for the car directly or through a Florida bank. Although the branch would send the original of the financing contract to Ford’s Michigan headquarters, the Florida branch would retain the car title, a copy of the financing contract, and the background information on the consumer. The Florida branch would also prepare and make monthly Florida documentary stamp payments. The consumer would make payments on the loan either directly to the Florida branch or to a Florida financial institution, which handled the money

pursuant to instructions from Michigan headquarters. When the loan was paid off, the Florida branch would notify the Florida government that the lien on the car was satisfied and send the title to the owner. J.A. 11-12.

Receivables growing out of wholesale sales had comparably strong connections to Florida. J.A. 8-11. As to the underlying sales, the placement and acceptance of the orders and the delivery of the cars occurred in Florida: Florida dealers placed their orders for cars with the Florida office of Ford Motor Company, which would order the cars from out-of-state assembly plants for delivery to Florida.⁹ Most dealers, upon solicitation by appellant Ford’s Florida branch offices, financed their wholesale purchases by obtaining a line of credit with Ford. The Florida branch performed the investigation required to determine, and in some cases made the decision, whether to extend a requested line of credit. Under that financing arrangement, when cars ordered by a dealer were shipped, a Michigan Ford employee would authorize a draw on the line of credit and credit the dealer’s account with Ford Motor Company. J.A. 8-9. The dealer would make monthly payments to the Florida branch of Ford, which would deposit the payments in a Florida bank account.¹⁰ When a dealer sold a car, it paid to the Florida

⁹ The standard agreement between Ford Motor Company and dealers provided that, unless otherwise specified, title would pass to the dealer (or financing firm) upon delivery of a car to the carrier outside Florida (*see* Exh. 3 to Pre-Hearing Stipulation ¶ 11(b), at 12-13), but, as noted above, title transfer does not determine the place of sale under the Florida scheme. In any event, even the practical significance of the title-transfer provision is unclear, because the standard agreement also provided that the risk of loss remained with Ford Motor Company or the carrier during shipment. *Id.* ¶ 11(c), at 13.

¹⁰ Ford generally limited the amount to be kept in the wholesale deposit accounts in each of its branches’ banks, requiring that portions of each account be transferred to Ford’s “pooling bank” outside Florida. A Florida branch’s own operations were paid for out of another bank outside Florida. J.A. 9.

branch of Ford both the principal balance on its wholesale receivable for that car and, upon billing by the Florida branch, the outstanding accrued interest. J.A. 9-10.

2. *Proceedings.* After a hearing based on the foregoing stipulated facts, appellee Department of Revenue determined that Ford owed approximately \$1.2 million in business situs intangible property taxes on its accounts receivable for 1980-1982, plus penalties and interest. J.S. App. 6-20. Although Ford did not contend that any other state actually taxed the receivables at issue,¹¹ it argued that Florida's tax was invalid because of the potential for such taxation if other states adopted both a business situs and a domiciliary intangible property tax. The Department stated that it lacked jurisdiction to rule on that argument. *Id.* at 13. The Department did, however, re-

¹¹ In fact, Ford, a Delaware corporation with its principal place of business in Michigan, has not been subject to multiple taxation of its Florida intangibles. J.A. 3. Ford acknowledges a Michigan domicile. Brief for Appellant 23 n.9. At least since 1980, not only has Michigan exempted companies such as Ford from its intangible property tax altogether (Mich. Comp. Laws § 205.133 (b)(12) (1986)), but even where the intangible property tax applies, Michigan has excluded from the tax on domiciliaries any intangibles that are both "placed in the hands of a manager or agent" outside Michigan and either "invested in a course of repeated transactions in obligations of persons residing outside [Michigan] or secured by property located outside [Michigan]." Mich. Comp. Laws §§ 205.131(c), 205.132(a) (1986). (A non-domiciliary is subject to the Michigan intangible property tax only as to property meeting the same conditions *inside* Michigan. *Ibid.*). Hence, even aside from the complete exemption from the tax, Ford would not be subject to the Michigan intangible property tax on accounts receivable managed in Florida and secured by Florida property.

Ford does not acknowledge Delaware as a domicile, and there is a question whether Delaware could claim Ford as a domicile for the present purposes based on incorporation alone. See *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 211 (1936). In any event, at least since 1980, Delaware has imposed no property tax on intangibles. 9 Del. Code § 8102 (1989).

ject Ford's argument that the tax Ford was required to pay was unfair on that ground and Ford's contention that it lacked a business situs in Florida. *Id.* at 13-14.

The District Court of Appeal, First District, affirmed. J.S. App. 1-5. The court first rejected Ford's basic premise that no more than one state may impose a property tax on the intangibles, pointing out that this Court has long repudiated that premise. J.S. App. 3, citing *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942), and *Curry v. McCannless*, 307 U.S. 357 (1939). The court explained that "since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property." J.S. App. 3. The court next concluded that the Commerce Clause did not call for a different result, citing decisions in which this Court refused to apply a different analysis under the Commerce Clause from its analysis under the Due Process Clause of the Fourteenth Amendment (relied on in *Curry* and *Aldrich*). J.S. App. 3-4, citing *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939), and *Pacific Tel. & Tel. Co. v. Tax Comm'n*, 297 U.S. 403 (1936). The court also observed that the business situs property tax was not integrally related to (let alone a tax on) an interstate commercial activity. The court explained that the tax had only an incidental and indirect effect on interstate commerce. J.S. App. 4.

The District Court of Appeal then rejected Ford's reliance on the internal consistency test as an argument for invalidating Florida's application of its business situs intangible property tax to Ford's accounts receivable, an argument based on the proposition that multiple taxation could conceivably result if other states adopted such a tax as well as a domiciliary intangible tax. The court noted that the internal consistency test has been applied by this Court only to franchise and excise taxes, includ-

ing taxes on corporate income and business activities. J.S. App. 4-5, citing *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), *Armco, Inc. v. Hardesty*, 467 U.S. 63 (1984), and *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). The Florida court distinguished such taxes from property taxes, pointing to decisions of this Court that made just such a distinction. J.S. App. 4-5, citing *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 448 (1980), and *Pullman's Palace-Car Co. v. Commonwealth*, 141 U.S. 18 (1891).

After declining to apply the internal consistency test as Ford requested, the District Court of Appeal stressed its continued adherence to the constitutional bar on discriminatory advantaging of local businesses over interstate businesses. This case, the court pointed out, involved no such discrimination. J.S. App. 5. As noted above, Florida equally imposed the business situs intangible property tax on all persons, whether residents of Florida or not.

The Florida Supreme Court subsequently denied review. J.S. App. 21.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ford claims constitutional protection against paying the Florida business situs intangible property tax on an unusual basis. Ford does not, and cannot, argue that the accounts receivable at issue were outside Florida's taxing jurisdiction or that Florida was barred from taxing their full value: Ford expressly concedes that Florida could do so. Brief for Appellant 25. Nor does (or can) Ford argue that Florida was discriminating against it by exempting from the same tax a Florida resident competing against Ford in the financing business: the business situs intangible tax applied equally whether or not the taxpayer was a resident of Florida. Ford's claim is that the Commerce Clause excuses it from paying the prop-

erty tax because *other* persons (i.e., its Florida domiciliary competitors) paid an *additional* tax (the domiciliary property tax on out-of-state intangibles) and that, if the same additional tax had been imposed on Ford where it is domiciled—which Ford concedes not to be the case, Brief for Appellant 23 n.9; note 11, *supra*—Ford would have been subject to two taxes on its Florida intangibles. This doubly abstract claim, based on another state's theoretical adoption of a Florida tax that is not imposed on Ford, presents no valid ground for invalidating the tax that Florida did impose on Ford.

I. The tax imposed on Ford—the business situs intangible property tax—readily meets the standards for Commerce Clause validity set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). To begin with, Ford's accounts receivable plainly had a substantial nexus with Florida, and the measure of the tax (the value of the receivables) bore a fair relation to the protection provided Ford by Florida. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The accounts receivable arose out of sales activity in Florida, took advantage of Florida business offices and financial institutions, and relied on Florida's protections of Florida lenders on loans involving Florida debtors and secured by Florida property.

The business situs intangible property tax was also fairly apportioned. Ford concedes as much when it acknowledges that Florida was perfectly entitled to tax the full value of all of the accounts receivable at issue (if only Florida had refrained from taxing other persons' other intangibles). Brief for Appellant 25. Ford's concession is correct: because the accounts receivable had a proper business situs in Florida and nowhere else, Florida was entitled to impose its business situs intangible property tax on their full value. Moreover, this Court's precedent, *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357

(1939); *Liverpool & L. & G. Ins. Co. v. New Orleans*, 221 U.S. 346 (1911), establishes that the Florida tax was fairly apportioned. That precedent makes clear that there is no due process bar to the taxation of intangible property at its full value by a state where it has a legitimate (unique) situs, and the fair apportionment requirement of Commerce Clause analysis is no more demanding than the Due Process Clause. See, e.g., *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980).

The external and internal consistency tests, considered as part of the apportionment analysis (*Goldberg v. Sweet*, 109 S. Ct. 582, 588-89 (1989)), are passed by the tax actually imposed on Ford. There is no external consistency question raised in this case, which is hardly surprising because Florida was not taxing more than its reasonable share of an interstate activity. *Id.* at 589. And the business situs intangible property tax—considered without regard to the tax on domiciliaries (see pages 17-18, 26-38, *infra*)—was itself internally consistent because, contrary to Ford's representations, "sale" and "delivery" were not alternative bases for imposition of the tax, either generally or as applied to the facts as stipulated here. If all states had the same business situs tax, none of Ford's accounts receivable would have been doubly taxed.

As to the final prong of the *Complete Auto* analysis, the Florida tax did not discriminate against out-of-state competitors. Florida gave no exemption from the business situs intangible property tax, or any offsetting tax benefits, to Florida residents competing with Ford for the financing of Florida sales. Indeed, the Florida tax was expressly designed to ensure that all such competitors paid the same tax on accounts receivable arising out of Florida sales.

II. This Court should reject Ford's attempt to extend the internal consistency test to override the conclusion that follows from a direct application of the *Complete Auto* analysis to the business situs intangible tax. To begin with, precedent does not support Ford's claim. No decision of this Court has ever applied the test, as Ford would have the Court do here, based on the hypothetical adoption by other states of a tax imposed by the taxing state on persons other than the complaining taxpayer. Moreover, of the three cases in which this Court has invoked the internal consistency test in striking down taxes, two involved overt discrimination against out-of-state businesses or sales in favor of in-state competitors or sales (*Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984)), and one involved a state's failure to apportion its tax according to the very basis on which it taxed—use of its highways (*American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987)). This case involves neither situation and would require a quite different use of the test.

This Court, in fact, would have to repudiate substantial precedent in order to accept Ford's argument in the present context. Although the internal consistency test is, by its terms, concerned with preventing certain kinds of multiple taxation, this Court has long rejected complaints about even actual multiple taxation (let alone merely hypothetical multiple taxation) in a narrow set of circumstances including the situation presented here. When the subject of a tax (such as income or intangible property) does not have a single definite location giving a single state plenary control over it, this Court has repeatedly permitted taxation both by a state having a legitimate connection to the subject of the tax (e.g., to the income or the intangible) and by the owner's domicile. See, e.g., *Curry v. McCanless*, *supra*; *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Shaffer v. Carter*, 252 U.S. 37 (1920). In other words, domicile is a legitimate basis for double taxation involving subjects

of tax that are not necessarily site-specific. The Court has thus recognized, on grounds equally applicable under the Commerce Clause, that domicile of owner and situs of property or activity are distinct bases of taxation—a doctrine that the Court would have to abandon in order to apply the internal consistency test as Ford urges.

To accept Ford's argument would also be contrary to the practical, realistic approach reflected in *Complete Auto*. Ford's proposed application of the internal consistency test would require hypothesizing a problem *twice* removed from the tax actually imposed by Florida on Ford—it relies on the supposition that the domiciliary tax Florida imposed on *other* persons had also been imposed on Ford by *another* state. Moreover, invalidating Florida's business situs intangible tax based on internal inconsistency would produce anomalous results. For example, Ford's single tax on its intangibles would be invalid even though Ford's argument here would permit double taxation of its intangibles (if Florida had only the business situs tax and Michigan had the domiciliary tax). In addition, Ford's argument would produce an actual favoring of nonresidents over their competitors who are residents of Florida—a form of reverse discrimination the Commerce Clause does not require.

More generally, extending Ford's hypothetical test to this case would take the Commerce Clause far beyond its core concern with impediments to interstate commerce and would do so with no practical justification. A more realistic direct analysis of fair apportionment (including *external* consistency analysis) already forbids actual state overreaching; and there is no practical need to resort here to Ford's hypothetical internal consistency test, as there is in the income tax area (where businesses face a risk of taxation many times over by up to 50 states). The "internal consistency" test is properly limited, in fair apportionment cases, to ensuring that states follow the logic of their own bases of taxation. Florida's tax passes that test.

ARGUMENT

I. THE BUSINESS SITUS INTANGIBLE PROPERTY TAX IMPOSED ON FORD IS VALID UNDER THE COMMERCE CLAUSE.

In *Complete Auto*, this Court articulated a four-part test for assessing the validity of a state tax under the Commerce Clause: the tax is valid if the subject of the tax has a substantial nexus to the taxing state, the tax is fairly related to the protections afforded by the state, the tax is fairly apportioned, and the tax does not discriminate against interstate commerce. 430 U.S. at 279. That test reflects the Court's effort to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Commonwealth Edison*, 453 U.S. at 616 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)). In recent years, the Court has regularly followed the *Complete Auto* analysis. See, e.g., *Goldberg v. Sweet*, 109 S. Ct. 582 (1989); *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). If the prescribed analysis is followed here, the business situs intangible property tax imposed by Florida on Ford—the tax actually at issue—readily withstands scrutiny under the Commerce Clause.

A. Nexus and Fair Relation. There is no dispute here, nor could there be, that, first, the subject of the business situs tax—Ford's accounts receivable—had a substantial nexus to Florida and that, second, the measure of the tax—the value of the receivables—bore a fair relation to the protections afforded Ford's receivables by Florida. See *Commonwealth Edison*, 453 U.S. at 626 ("fair relation" prong of *Complete Auto* test requires "that the measure of the tax must be reasonably related to the extent of the contact"). Ford's accounts receivable arose out of sales in Florida arranged through Flor-

ida business offices employing Florida residents; they were owed and paid by Florida debtors and processed through Florida financial institutions; their servicing was conducted through Florida branch offices; they typically were secured by property in Florida; and they relied on Florida government authorities in recording liens on that property and, if necessary, in collecting on the loans. The first two components of the *Complete Auto* test are easily satisfied because the value of Ford's receivables, beginning with their very creation, depended substantially on privileges granted to Ford in Florida.

B. *Fair Apportionment*. Florida's tax on the full value of Ford's accounts receivable based on their business situs was fairly apportioned. The Court has explained that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 109 S. Ct. at 588. The Court has further explained that "in order to show unfair apportionment, a taxpayer 'must demonstrate that there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. at 1622 (quoting *Container Corp.*, 463 U.S. at 180; omitting internal quotation marks). Transposed to the property tax context, the same basic notions require that states avoid taxing property that is not fairly within their jurisdiction. See, e.g., *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). That requirement is met here.

1. To begin with, Ford has effectively conceded that Florida may properly tax the full value of its receivables with a Florida business situs. Ford states: "Florida could choose to tax the entire value of all intangibles that arise out of a sale of property in the state." Brief for Appellant 25. Florida in fact chose to tax only a portion of such intangibles—those which retained a suffi-

cient connection to Florida in any given tax year. See pages 8-9, *supra*.¹²

Florida plainly was entitled to tax the full value of Ford's accounts receivable based on their business situs. For Commerce Clause purposes, it might well be sufficient that Florida was undoubtedly the place where the competition between financing companies took place for the creation of these receivables: Florida could fairly claim to be the sole site of that competition. See J.A. 11 ("At the retail level, [Ford] actively competed with local banks to provide financing."). In any event, Florida was the state where the receivables not only were created but were serviced by Florida employees in Florida offices using Florida banks, were paid by Florida debtors, were secured by Florida property, were recorded through Florida government offices, and were enforced through Florida courts (if necessary). Given these pervasive connections between the receivables and Florida, it can fairly be concluded that, on the present record, no other state could reasonably have claimed business situs as a basis for taxing the receivables. If any receivable acquired the protections and privileges necessary to obtain a business situs in another state—and, as explained above, Florida recognized that an account receivable *could* relinquish its Florida business situs in certain circumstances—there is no basis in this record for so concluding and no suggestion by Ford to that effect.

Thus, because the *basis* of the business situs tax—namely, business situs—was uniquely in Florida, there was no need for Florida to tax only a portion of the receivables' value. In this respect, this case is unlike every case that Ford cites involving Commerce Clause challenges to property taxes. See Brief for Appellant 30.

¹² This was the only intangible tax Ford was assessed. Ford seeks to broaden the analysis by reference to the domiciliary tax, to which Ford, of course, was not subject. We address that issue at pages 26-38, *infra*.

In all of those cases, the tax at issue was based on presence in the state of property used in a business, and that same basis was shared by more than one state: the property—the railroad rolling stock, freight cars, flight equipment, vessels, airplanes—was actually present as part of the taxpayer's business in several states.¹³ Those cases merely illustrate that, when "the property is subject to taxation by more than one jurisdiction" (*ibid.*) on the same basis, the value of the property must be apportioned. In this case, no such apportionment was required because Florida was the only state that could tax the accounts receivable based on their business situs.

The business situs tax is also different from the taxes at issue in other cases raising apportionment problems. Unlike the income taxes at issue in the line of cases including *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and *Container Corp.*, 463 U.S. 159, for example, the Florida tax did not start with a concededly multistate quantity and then claim a share of it. Rather than seek to tax a proportion of Ford's intangible property company-wide, Florida applied its tax only to those accounts receivable with an identifiable Florida business situs.¹⁴ Similarly, Florida's business situs tax was not a flat tax imposed on a variable basis. Unlike the flat tax expressly based on highway use, for example (*American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987)), the Florida tax varied in amount according to the amount of intangible property meeting

¹³ See *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968); *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962); *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590 (1954); *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899).

¹⁴ That is, Florida used a form of separate accounting for its business situs tax.

the business situs definition. In short, the Florida business situs tax was imposed on a basis that is wholly Florida's and was tied to the magnitude of the basis of the tax. It was therefore fairly apportioned.

This Court, in fact, has already held that a tax like Florida's is fairly apportioned. In *Curry v. McCanless*, *supra*, and *State Tax Comm'n v. Aldrich*, *supra*, this Court held, reaffirming an earlier line of cases, *see, e.g., Liverpool & L. & G. Ins. Co. v. New Orleans*, 321 U.S. 346 (1911); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395 (1907); *Blackstone v. Miller*, 188 U.S. 189 (1903), that a state could tax the full value of intangible property having a legitimate situs in that state (even though the state of domicile might also tax the same property). Although those decisions involved Due Process Clause claims, they simultaneously establish fair apportionment for purposes of Commerce Clause analysis.¹⁵ This Court has held that fair apportionment is a requirement of both clauses. *See, e.g., Container Corp.*, 463 U.S. at 169; *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980); *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 324-25 (1986).¹⁶ Thus, the Florida business situs tax cannot be held to be un-

¹⁵ The Commerce Clause has not, to our knowledge, ever been applied to an intangible property tax or, indeed, to any property tax except insofar as the property involved consisted of goods transported in interstate commerce or of instrumentalities (such as vehicles) used in carrying on such commerce. *See* P. Hartman, *Federal Limitations on State and Local Taxation* § 7.1, at 381-82 (1981). All of the Commerce Clause property tax decisions cited by Ford fall into those categories. Although Ford also cites one Commerce Clause case involving intangibles, *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), the tax at issue was not a property tax, but a tax on stock transfers resulting from commercial transactions—one that, indeed, facially discriminated according to the place of sale.

¹⁶ *See* J. Hellerstein & W. Hellerstein, *State and Local Taxation* 830 n.16 (5th ed. 1988) ("the conception of extraterritoriality as the basis for invalidating taxes under the Due Process Clause and

fairly apportioned without declaring that it violates the Due Process Clause, a proposition this Court has long rejected.

2. This Court has on a number of occasions analyzed "whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *Goldberg v. Sweet*, 109 S. Ct. at 588. External consistency is not raised in this case; and in any event, given that the case involves a property tax based on a unique business situs, Florida plainly did not tax more than "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 589. Ford does complain of internal inconsistency, but that complaint—insofar as it looks to the business situs tax actually imposed on Ford, rather than to the additional tax imposed on domiciliaries (*see* pages 26-38, *infra*)—rests upon a misunderstanding of the tax.

Applying the internal consistency test, Ford argues that double taxation might have resulted if other states had adopted the business situs tax because, Ford says, the tax was imposed if either the sale giving rise to the accounts receivable occurred in Florida or the vehicles were delivered in Florida (so that the tax could be imposed by the state of sale and the state of delivery). Brief for Appellant 22. That argument is unavailing for two reasons. First, as explained above (page 7, *supra*), Florida did not treat sale and delivery as alternative bases for finding a business situs. If delivery was to occur outside Florida as part of the sale, so that the sale would not have been considered in Florida for purposes

the requirement of apportionment as the prerequisite of validation under the Commerce Clause . . . simmer down to essentially the same result, namely, that a State can tax only what is 'justly attributable' to it"); P. Hartman, *supra*, § 2.3, at 21 ("an unfair apportionment is constitutionally invalid, both because an illegal restraint is imposed on interstate commerce, and because it is a violation of the due process clause").

of the Florida sales tax, Florida would not have treated the sale as in Florida for purposes of the intangible property tax either.¹⁷

Second, and in any event, Ford has not alleged facts making any supposed divergence between sale and delivery applicable to it. There is no allegation that Florida retail sales ever occurred without delivery in Florida. And the only aspect of wholesale sales alleged to have occurred outside Florida, title transfer, was insufficient by itself to remove the sale from Florida, given that the placement and acceptance of the offer, the delivery of the goods, and the transfer of risk of loss all occurred in Florida. In these circumstances, both in general and as applied to Ford, the business situs intangible property tax did not rest on alternative conditions that could have allowed several states applying the same tax each to claim business situs.

C. *Discrimination.* Ford acknowledges that, if Florida's tax is not unfairly apportioned, there is no independent problem of discrimination in this case. Ford argues that "the cause of the problem is the state's failure to apportion the tax" (Brief for Appellant 24), alleging merely that an unfairly apportioned tax is by definition discriminatory (*id.* at 25). That position follows from Ford's limitation of the question presented to whether the Florida tax is invalid under the internal consistency test, a test that this Court has treated as a part of the apportionment inquiry (*see Goldberg v. Sweet*, 109 S. Ct. at 588) unless discriminatory favoring of in-state competitors or activity has been shown

¹⁷ Thus, Florida followed this Court's own practice with regard to the location of sales for taxing purposes. The Court "has generally allowed the state of destination to tax retail sales transactions while forbidding the state of origin" to do so. Hellestein, *Is "Internal Consistency" Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L. Rev. 138, 174 (1988).

directly (*see Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 240-47; *Armco, Inc. v. Hardesty*, 467 U.S. at 644).

In any event, the Florida business situs intangible property tax did not discriminate against interstate commerce. The Florida tax did not in any way relieve Florida residents of the business situs tax paid by its nonresident competitors such as Ford. All persons competing for the financing of Florida sales paid the same tax on the accounts receivable resulting from those sales. Indeed, the express aim of the business situs tax was to ensure that all competitors for such financing were subject to the same tax. Fla. Stat. § 199.112(1); *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d at 902. Nor did Florida exempt Florida residents from some other tax so as indirectly, but just as effectively, to subsidize the offering of financing by Florida residents. To the contrary, Florida residents, being subject to the domiciliary tax, had an added tax burden to carry, not a lesser one that favored them over their nonresident competitors such as Ford.

II. THE INTERNAL CONSISTENCY TEST SHOULD NOT BE EXTENDED TO INVALIDATE FLORIDA'S BUSINESS SITUS TAX BASED ON THE HYPOTHETICAL ADOPTION BY A DIFFERENT STATE OF A DIFFERENT TAX IMPOSED ON A DIFFERENT BASIS.

Notwithstanding that a direct application of the *Complete Auto* analysis demonstrates the validity of Florida's business situs intangible property tax as applied here, Ford seeks constitutional protection from the tax by urging application of the internal consistency test based on the assumption that Michigan had adopted Florida's domiciliary intangible tax as well as its business situs tax. The internal consistency test, however, has never been applied in the manner suggested or in circumstances like those presented here. To extend it to this

case, moreover, would require repudiation of longstanding doctrine permitting even actual double taxation based on domicile where the subjects of the tax, like intangibles, are not uniquely within a single state's authority. For that and other reasons, Ford's proposed extension of the test would be an inappropriate expansion of Commerce Clause restrictions on state taxing authority.

A. This Court Has Never Applied The Internal Consistency Test In Circumstances Like The Present.

Ford suggests that this Court's precedent already establishes that a finding of internal consistency is always an essential prerequisite to rejecting a challenge under the Commerce Clause. Brief for Appellant 15-22. As an initial matter, we note that the suggestion is incorrect. The test, of course, was not even articulated until 1983 in *Container Corp.*, 463 U.S. at 169, and it was not used in striking down a tax until 1984 in *Armco, Inc. v. Hardesty*, 467 U.S. at 644. Even since then, this Court has decided Commerce Clause tax cases without making reference to the test. *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). More important, perhaps, it is clear that the Court has never applied the test either in the manner Ford urges or relied on it to invalidate any tax like the present.

To date, the Court has applied the internal consistency test by focusing on the statutory provisions that directly affected the complaining taxpayers: that is, by looking to the very tax paid by the taxpayer, along with exemptions from that tax extended to its competitors. *See Goldberg v. Sweet*, 109 S. Ct. at 589; *American Trucking Ass'ns v. Scheiner*, 483 U.S. at 284; *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 247; *Armco, Inc. v. Hardesty*, 467 U.S. at 644; *Container Corp.*, 463 U.S. at 169. In the present case, Ford must propose a different method, because it is subject only to the business situs tax, which contains no pertinent

exemptions and which readily passes the internal consistency test as this Court has applied it. See pages 24-25, *supra*. Ford suggests, therefore, that the Court hypothesize not just that other states had adopted the business situs tax but that other states (in particular, Michigan) had adopted that tax *and* also an additional tax imposed by Florida on other persons (the domiciliary tax applied to Florida residents). This new approach would mark a quite different use of the internal consistency test.

Second, the internal consistency test has never been applied to strike down a tax where, as here, there has been neither discrimination by unequal taxation or exemption nor failure by a state to apportion its tax according to its own asserted basis for the tax. The Court has relied on the test in three cases invalidating state taxes. In *Scheiner*, the Court used the test to explain that Pennsylvania had not fairly apportioned its flat tax, where the tax was based on highway use but the tax was not apportioned to the magnitude of such use. 483 U.S. at 284. In the other two cases, the Court relied on the test only after directly finding to be discriminatory an exemption for local commerce denied to out-of-state commerce. In *Armco*, the Court first directly condemned as discriminatory a West Virginia wholesale tax that exempted local manufacturers, thus disfavoring their out-of-state competitors who sold their goods at wholesale in the state. 467 U.S. at 642. The Court then relied on the internal consistency test to reject the asserted defense that the complaining taxpayer should have to prove that its total tax burden was higher by identifying the taxes it paid where it manufactured its goods. 467 U.S. at 644-45. Similarly, in *Tyler Pipe*, the Court directly found discrimination: Washington required all out-of-state manufacturers to pay a tax when they sold their goods in the state, without offset for any manufacturing tax they incurred, while in-state manufacturers were granted such an offset, thus disfavoring the out-of-state manufacturers who competed for sales

in Washington. 483 U.S. at 240-46.¹⁸ The Court then relied on the internal consistency test to reject the same defense as in *Armco*. 483 U.S. at 247.

In all three cases, the internal consistency test was put to limited use—either in rejecting a defense to what the Court found to be a facially discriminatory tax (in *Armco* and *Tyler Pipe*) or, more affirmatively, in explaining that a state had failed to apportion the tax according to its asserted basis for the tax (in *Scheiner*).¹⁹ Neither situation is present here. The Florida business situs tax plainly was not discriminatory;²⁰ nor did Florida fail to apportion the tax according to its asserted basis. That is so not only as to the business situs tax alone but also as to that tax considered in conjunction with the domiciliary tax. Because the basis of the latter tax (domicile) is different from the basis of the tax imposed on Ford (business situs), both taxes may be imposed without any internal inconsistency in the ordinary

¹⁸ From a different angle, the Washington tax discriminatorily penalized in-state manufacturers that sold outside Washington by imposing the manufacturing tax on them while exempting from the manufacturing tax those manufacturers which sold in Washington. 483 U.S. at 240-46. In addition, as the Court took care to point out, the entire taxing scheme at issue was in fact merely a redrafted form, with identical economic benefits to in-state manufacturers that sold inside Washington, of an earlier version that had a directly discriminatory selling tax—one that exempted in-state manufacturers from the selling tax applied to out-of-state manufacturers. 483 U.S. at 235-37.

¹⁹ The Court in *Container Corp.* made this latter use of the test in holding a state to its own asserted basis for apportioning to itself a proper share of company-wide multistate income. 463 U.S. at 169. When a state taxes income based on the connection of the income to the state, that same basis may be used by other states, and the taxing state therefore must use an apportionment method that shares that basis for taxation with the other states.

²⁰ Nor, unlike the tax at issue in *Tyler Pipe*, was the Florida tax enacted to retain in masked form a previous, invalidated discriminatory tax.

and original sense of that phrase—that is, without the state being justly accused of violating the logic of its own basis of taxation. Thus, Ford's argument asks this Court to make an unprecedented use of the internal consistency test.

B. This Court Should Not Extend The Internal Consistency Test To Invalidate The State Tax At Issue Here.

1. The Objections To Multiple Taxation That Underlie The Internal Consistency Test Have Been Soundly Rejected In The Present Circumstances.

Application of the internal consistency test as Ford proposes would not only require an extension of existing precedent but would, in fact, run headlong into well-established precedent. The internal consistency test rests, by its very terms, on a constitutional concern with "eliminating exposure to the burden of a multiple tax" (*Tyler Pipe*, 483 U.S. at 246) in some circumstances.²¹ In a narrow class of cases that includes this case, however, that concern has long been laid aside. Where, as here, any such multiple taxation would be attributable to a state's special power to tax on the basis of domicile and where the subject of the tax is not uniquely and wholly situated within a different state, and therefore within its exclusive authority, multiple taxation is permissible.

That principle has been applied in two important settings. As already noted, it has long been established that intangible property may be taxed by both the state of its owner's domicile and the state where the property has a legitimate situs. See page 23, *supra*. It is equally well established that states may tax both their residents' en-

²¹ The internal consistency test, of course, permits some double taxation. As Ford acknowledges (Brief for Appellant 27-28), the test would allow the double taxation that would occur if Michigan adopted a domiciliary tax and Florida imposed the business situs tax.

tire income—even where the income results from interstate business—and the income of nonresidents earned in the state, even though double taxation results from such a scheme if adopted nationwide. *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932); *Shaffer v. Carter*, 252 U.S. 37 (1920); see *Curry v. McCanless*, 307 U.S. at 363 n.1. See generally J. Hellerstein & W. Hellerstein, *State and Local Taxation* 829-30, 864-65.

The internal consistency test runs afoul of those decisions, not because they are wrong, but because the test makes no allowance for those situations in which double taxation is entirely consistent with constitutional principles. In the present circumstances, for example, the Court has recognized that domicile provides a basis for taxation that is very different from situs. See, e.g., *New York ex rel. Cohn v. Graves*, 300 U.S. at 313. The domicile and situs states afford different protections, benefits, and privileges for which each may demand a return. The domicile protects and benefits—and, in the case of corporations, often gives life and definition to—the owner and its enjoyment of the fruits of what it owns. *Ibid*. The situs state, when situs is legitimately defined, protects, benefits, and gives value to the intangible property located there or income earned there—as Florida did here in the numerous ways in which it gave value to Ford's accounts receivable. *Shaffer v. Carter*, 252 U.S. at 50.

Whereas situs as a basis of taxation cannot support taxation beyond values properly tied to the situs state, domicile logically may extend to all that the domiciliary owns. That principle, standing alone, could support a

²² For similar reasons, this Court has long recognized that domicile and presence are distinct and independently sufficient bases for a state's assertion of its judicial power over a person. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 723 (1877).

domicile state's taxation of all of its residents' property, of whatever kind and wherever located. See Bittker, *The Taxation of Out-of-State Tangible Property*, 56 Yale L.J. 640 (1947). But by longstanding precedent, a countervailing principle limits the reach of domicile as a basis for taxation. Real property and tangible personal property, like certain activities such as sales (*Tyler Pipe*, 483 U.S. at 251) and mineral severance (*Commonwealth Edison Co. v. Montana*, 453 U.S. at 617), have a unique physical location and thereby come within the plenary authority of that state.²³ As to such site-specific subjects of taxation, only the situs state may tax. See, e.g., *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612-14 (1962); *Curry v. McCannless*, 307 U.S. at 364. But other taxes are not necessarily site-specific in that sense—for example, an income tax on a unitary business's net income whose creation may be attributable to activities in many states, or a property tax on intangible property that may take its value from a number of states.²⁴ In those circumstances, no single state has actual control over the subject of the tax, and there is no counterweight limiting domicile as a distinctive basis for taxation to supplement the basis that may be claimed by each state where the subject has a legitimate situs.

This doctrine approving double taxation in the present case and related contexts cannot be avoided on the ground that this case involves the Commerce Clause. For one

²³ See *Pennoyer v. Neff*, 95 U.S. (5 Otto) at 722 ("every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory").

²⁴ Although Ford's accounts receivable, as reflected in the present record, are so pervasively connected to Florida that no other situs would seem possible, there is obviously a vast spectrum of possible connections (debtor, security, management, financing, etc.) between any given type of intangible property (debts, stocks, deposits, etc.) and particular states.

thing, in *Shaffer v. Carter*, the Court rejected Commerce Clause as well as Due Process Clause challenges to the state income tax statute—which, remarkably like the statute in this case, effectively created two taxes, one reaching all income of domiciliaries, another reaching only in-state income of non-domiciliaries. 252 U.S. at 56-57. Moreover, several of the decisions explicitly indicated that the doctrine applied where the income at issue was generated by interstate business. See, e.g., *New York ex rel. Cohn v. Graves*, 300 U.S. at 313; *Metropolitan Life Ins. Co. v. New Orleans*, *supra*. In any event, as noted above, this Court has explained that, where, as here, there is no discrimination between competitors based on state boundaries, the Commerce Clause is not violated if the requirements of the Due Process Clause are met: there is no lack of fair apportionment if two states rely on two distinct bases of taxation to tax the same subject. See pages 23-24, *supra*.

Indeed, there can be little justification for denying each state its distinct and legitimate taxing authority under the Commerce Clause. Ford does not question the authority of a state to tax intangibles with a situs such as that present here; nor does Ford question domicile as a legitimate basis for taxing intangibles with a situs outside the boundaries of the taxing state. What it seeks to do, instead, is to invoke a test that makes no provision for multiple legitimate bases for taxation and to use that test to strike down an otherwise valid tax. The Court should reject that effort.²⁵

²⁵ We also note that it would be anomalous to fashion new Commerce Clause constraints on state taxes that conform to due process when the Commerce Clause has never before even been applied to an intangible property tax. See note 15, *supra*. It would be especially anomalous to strike down a tax under the Commerce Clause where the potential for double taxation was directly traceable to a (theoretically adopted) tax on domiciliaries. This Court recently ruled that the Commerce Clause simply does not "protect state residents from their own state taxes." *Goldberg v. Sweet*, 109 S. Ct. at 591.

2. Extension Of The Internal Consistency Test To This Case Would Be An Inappropriate Tightening Of Commerce Clause Restrictions On State Taxing Authority.

In any event, to extend the internal consistency test as Ford wishes would dilute Commerce Clause analysis rather than strengthen it. Although Ford correctly points out that, "[a]t least since the decision in *Complete Auto*, it has been clear that the validity of a state tax under the Commerce Clause depends, not on its form, but on its 'practical effect' in light of 'economic realities'" (Brief for Appellant 29, quoting 430 U.S. at 279), its argument is ironically self-defeating. The very essence of the internal consistency test, if taken beyond its narrow uses to date, would be to require an increasingly hypothetical analysis unfocused on actual state overreaching or on concrete impediments to or discrimination against interstate commerce. See *Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202, 3205 (1990) (noting criticism of internal consistency test as "a retreat from the economically realistic approach adopted by *Complete Auto*").

The hypothetical nature of the proposed inquiry in this case is especially pronounced: as a practical matter, the potential for double taxation on which Ford relies is *twice* removed from the tax actually imposed by Florida on Ford. The approach Ford presses would first look away from Florida's business situs intangible tax to its domiciliary intangible property tax, which Ford does not pay. It would then imagine that another state, Michigan, adopted that tax (which it has not). Finding a Commerce Clause violation in these circumstances, where there was no actual impediment to interstate commerce²⁶ and there were entirely legitimate and nondiscriminatory bases for both types of Florida tax, would be inconsistent with the *Complete Auto* commitment to focusing on practicalities in respecting the "extremely limited restric-

²⁶ Even in amount, the tax is small—\$10 on a \$10,000 loan.

tions" the Commerce Clause places on state taxing authority. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. at 457 (internal quotation marks omitted).

The difficulties with Ford's approach are reflected in the series of anomalous results that it would (indeed, is intended to) produce. According to Ford, it may be relieved of the obligation to pay the Florida business situs tax, even though it concedes that, at least with regard to the claim made before this Court, it could be subjected to *actual* double taxation on its Florida intangibles if Michigan adopted a domiciliary intangible tax and Florida had only the business situs intangible tax. Looked at another way, Ford concedes that it would have to pay the Florida business situs tax provided that Florida repealed its tax on out-of-state intangibles owned by domiciliary corporations—even though the only practical effect of that repeal on Ford would be to *lower* the taxes of its competitors. Moreover, the immediate result of invalidating the business situs tax, as Ford asks in seeking to be excused from payment of the tax, would be to produce a discrimination *against* Florida domiciliaries, who would have to pay a tax on their Florida-based intangibles even while their nonresident competitors did not. Although the Commerce Clause may not forbid such disfavoring of domiciliaries (see *Goldberg v. Sweet*, 109 S. Ct. at 591), surely it does not require that result.

There may be cases where the constitutionality of a state tax can be tested only by means of abstract, highly speculative inquiries, but this case is surely not one of them. If, for example, a state's method of apportioning an income tax on a multistate business is challenged, it seems obvious that the courts cannot undertake in every case to examine the various income taxes, potential or actual, of the numerous states in which that business operates. Cf. *Armco, Inc. v. Hardesty*, 467 U.S. at 644-45 (courts need not analyze "shifting complexities of

the tax codes of 49 other States"). The internal consistency test in that setting, used as a threshold test for fair apportionment, serves to avoid a judicially unmanageable task, allowing the courts to assess the adequacy of the state's chosen apportionment method. See *Container Corp.*, 463 U.S. at 169.²⁷ In the present setting, by contrast, there is no such practical problem with a direct application of a realistic fair apportionment analysis (including the external consistency test), as such analysis requires consideration only of the legitimate taxing authority of the domicile and situs states. There is correspondingly less justification for avoiding the more realistic analysis by adopting the necessarily hypothetical internal consistency test Ford proposes.

This Court can respect the full and proper meaning of "internal consistency," moreover, without subjecting every state tax statute to a mechanical test of potential double taxation on the hypothesis of universal adoption. Putting aside cases involving direct discrimination—where the test serves at most a backup function explaining that such a tax is invalid without regard to burdensome, shifting, case-by-case analysis of the potentially offsetting effects of taxes in surrounding states (see *Tyler Pipe*, 483 U.S. at 247; *Armco, Inc. v. Hardesty*, 467 U.S. at 644-45)—the internal consistency test simply requires that, when a state puts forward a basis of taxation, it must be internally consistent in following the logic of that basis of taxation. Thus, in *Container Corp.*, when the state taxed a share of the taxpayer's overall income on the ground that it made some contribution to it, the state was required to employ a method of appor-

²⁷ Of course, the practical problem presented in the income tax context is not presented in cases such as *Armco* and *Tyler Pipe*. But those cases involve discrimination between competitors, a problem that is absent in the present case and that calls for use of the internal consistency test, if at all, in a more limited, defensive role. See pages 28-29, *supra*.

tionment whose own logic recognized that the state was taking a share of a single whole shared by other states that made contributions to the overall income; hence, the method, if adopted by all states, had to produce a tax base amounting to that whole. Similarly, in *Scheiner*, when the state imposed a tax based on highway use, it was obliged to be internally consistent in fitting the amount of the tax to the amount of such use (if no administrative difficulties made that infeasible). When a state has two distinct bases for somewhat different taxes, however, the state has not violated its own internal logic, and there is no violation of the test.

In the end, much of Ford's argument rests on the notion that simplicity is a sufficient ground for adoption of a mechanical rule requiring universal testing of state tax laws by hypothesizing that other states have adopted them (or, as here, have adopted other related laws). See Brief for Appellant 21. But such a single-minded focus on mechanical simplicity is out of place in Commerce Clause doctrine. This Court has recognized that, in making "the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers," a proper inquiry does not depend on mechanical tests, but instead "turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Where, as here, both precedent and sound principle support preservation of a state taxing authority that causes no discernable interference with interstate commerce; where there is no potential for taxation many times over (as with income taxes paid by a nationwide business), because the sole basis of any potential multiplicity is domicile; where the state has a strong non-discrimination interest of its own in preserving the tax; and where any future problems caused by the intangible property tax can always be addressed by

Congress (as well as multistate tax conferences)—Commerce Clause doctrine should not be altered to impose a new limit striking down this long-approved tax.

CONCLUSION

If the appeal is not dismissed, the judgment of the District Court of Appeal of Florida, First District, should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH

Attorney General

JOSEPH C. MELLICHAMP, III

Senior Assistant Attorney General

JEFFREY M. DIKMAN

Assistant Attorney General

Department of Legal Affairs

Tax Section, Capitol

Tallahassee, FL 32399-1050

(904) 487-2142

H. BARTOW FARR, III *

RICHARD G. TARANTO

ONEK, KLEIN & FARR

2550 M Street, N.W.

Washington, D.C. 20037

(202) 775-0184

SEPTEMBER 1990

* Counsel of Record

FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
v. *Appellant,*

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

REPLY BRIEF FOR APPELLANT

JAMES E. TRIBBLE
BLACKWELL & WALKER, P.A.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

MARK L. EVANS
Counsel of Record
ALAN I. HOROWITZ
PATRICIA M. LACEY
ANTHONY F. SHELLEY
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Appellant

Of Counsel:

FRANK A. STOCKING
JOHN P. VAN DUSEN
JOHN M. NEBERLE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
(313) 323-0537

TABLE OF CONTENTS

	Page
I. THIS COURT SHOULD REVIEW THE TAX ACTUALLY IMPOSED BY THE FLORIDA LEGISLATURE, NOT THE REFORMULATED VERSION PUT FORWARD BY APPELLATE COUNSEL	3
II. FLORIDA'S TWO-TAX THEORY BRINGS THIS CASE SQUARELY WITHIN ARMCO AND TYLER PIPE AND THUS CONFIRMS THAT ITS TAXING SCHEME IS INVALID....	5
III. THE INTERNAL CONSISTENCY TEST SERVES AN IMPORTANT ROLE IN PROTECTING INTERSTATE COMMERCE FROM DISCRIMINATORY STATE TAXES	9
IV. THE COMMERCE CLAUSE DOES NOT PERMIT MULTIPLE TAXATION OF INTANGIBLES THAT ARISE OUT OF INTERSTATE COMMERCE	13
V. THIS COURT HAS APPELLATE JURISDICTION	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>Adams Express Co. v. Ohio State Auditor</i> , 166 U.S. 185 (1897)	13, 15
<i>American Ry. Express Co. v. Levee</i> , 263 U.S. 19 (1923)	17, 19
<i>American Trucking Ass'ns v. Scheiner</i> , 483 U.S. 266 (1987)	11
<i>Armco Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	2, 6, 7, 8, 11, 12
<i>Blackstone v. Miller</i> , 188 U.S. 189 (1903)	14
<i>Blair v. Chicago</i> , 201 U.S. 400 (1906)	18
<i>Braniff Airways, Inc. v. Nebraska Bd. of Equalization</i> , 347 U.S. 590 (1954)	15
<i>Central Greyhound Lines, Inc. v. Mealey</i> , 334 U.S. 653 (1948)	9
<i>Central R.R. v. Pennsylvania</i> , 370 U.S. 607 (1962)	9
<i>City of Canton v. Harris</i> , 109 S. Ct. 1197 (1989)	19
<i>Communist Party v. Whitcomb</i> , 414 U.S. 441 (1974)	19
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	15
<i>Container Corp. v. Franchise Tax Board</i> , 463 U.S. 159 (1983)	15
<i>Curry v. McCannless</i> , 307 U.S. 357 (1939)	14
<i>Department of Banking v. Pink</i> , 317 U.S. 264 (1942)	19
<i>Fargo v. Hart</i> , 193 U.S. 490 (1904)	15, 16
<i>Florida Steel Corp. v. Dickinson</i> , 328 So. 2d 418 (Fla. 1976)	3
<i>Freeman v. Hewit</i> , 329 U.S. 249 (1946)	9
<i>Gwin, White & Prince, Inc. v. Henneford</i> , 305 U.S. 434 (1939)	9, 10
<i>Halliburton Oil Well Cementing Co. v. Reily</i> , 373 U.S. 64 (1963)	10
<i>J.D. Adams Mfg. Co. v. Storen</i> , 304 U.S. 307 (1938)	9
<i>Japan Line, Ltd. v. County of Los Angeles</i> , 441 U.S. 434 (1979)	13, 15
<i>Johnson Oil Ref. Co. v. Oklahoma</i> , 290 U.S. 158 (1933)	11

TABLE OF AUTHORITIES—Continued

	Page
<i>Lawrence v. State Tax Comm'n</i> , 286 U.S. 276 (1932)	14
<i>Liverpool & L. & G. Ins. Co. v. Board of Assessors</i> , 221 U.S. 394 (1911)	14
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> , 309 U.S. 33 (1940)	10
<i>Metropolitan Life Ins. Co. v. New Orleans</i> , 205 U.S. 395 (1907)	14
<i>Meyer v. Wells, Fargo & Co.</i> , 223 U.S. 298 (1912) ..	15
<i>Michigan-Wisconsin Pipe Line Co. v. Calvert</i> , 347 U.S. 157 (1954)	17
<i>Mobil Oil Corp. v. Commissioner of Taxes</i> , 445 U.S. 425 (1980)	13, 15
<i>New York ex rel. Cohn v. Graves</i> , 300 U.S. 308 (1937)	14
<i>Nippert v. City of Richmond</i> , 327 U.S. 416 (1946)	3
<i>Northwest Airlines, Inc. v. Minnesota</i> , 322 U.S. 292 (1944)	11, 15
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985)	19
<i>Ott v. Mississippi Valley Barge Line Co.</i> , 336 U.S. 169 (1949)	9
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988)	18
<i>Pullman's Palace-Car Co. v. Pennsylvania</i> , 141 U.S. 18 (1891)	16
<i>Shaffer v. Carter</i> , 252 U.S. 37 (1920)	14, 15
<i>Southern Ry. v. Kentucky</i> , 274 U.S. 76 (1927)	15
<i>St. Louis v. Prapotnik</i> , 485 U.S. 112 (1988)	19
<i>Starkey v. Carson</i> , 189 So. 385 (Fla. 1939)	3
<i>State ex rel. Seaboard Air Line R. Co. v. Gay</i> , 35 So. 2d 403 (Fla. 1948)	3
<i>State Tax Comm'n v. Aldrich</i> , 316 U.S. 174 (1942)	14
<i>Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue</i> , 483 U.S. 232 (1987)	2, 7, 8, 11, 12
<i>Wallace v. Hines</i> , 253 U.S. 66 (1920)	15
<i>Western Live Stock v. Bureau of Revenue</i> , 303 U.S. 250 (1938)	16

TABLE OF AUTHORITIES—Continued

<i>Statutes and Legislative Materials</i>	Page
28 U.S.C. § 1257 (1982)	16, 18, 19
28 U.S.C. § 2101 (c)	18
Pub. L. No. 100-352, § 7, 102 Stat. 664 (1988)	16
Fla. Stat.	
§ 199.032 (1983)	3
§ 199.112(1) (1983)	4
§ 220.68 (1983)	10
Fla. H. Rep. Comm. on Finance & Taxation, Fiscal Note No. 2256 (Apr. 29, 1977)	4
<i>Miscellaneous</i>	
1A <i>Sutherland Statutory Construction</i> § 22.33 (4th ed. 1985)	18

IN THE
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OCTOBER TERM, 1990

No. 88-1847

FORD MOTOR CREDIT COMPANY,
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DEPARTMENT OF REVENUE, STATE OF FLORIDA,
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On Appeal from the District Court of Appeal
of Florida, First District

REPLY BRIEF FOR APPELLANT

Florida does not dispute that its tax on intangible property, considered as a whole, fails the internal consistency test—a standard that this Court repeatedly has identified as one prerequisite for compliance with the Commerce Clause. The state's effort to save the tax despite that constitutional infirmity proceeds along three analytical paths.

First, the state attempts reconstructive surgery. It splits the tax in two (calling one part a "business situs intangible tax" and the other a "domiciliary intangible tax") (Br. 7-9), reshapes the "business situs" tax by interpreting "sale" to mean something other than a transfer of ownership (Br. 7), and then pronounces the bifurcated and reformulated "business situs" tax (when "considered without regard to the tax on domiciliaries") "internally consistent." Br. 16. The state's semantical shell game, for which there is no basis in the statute, serves only to emphasize, not to conceal, the facially discriminatory fea-

ture of the intangible property tax. Because Florida domiciliaries engaged in intrastate commerce enjoy a kind of "multiple activities" exemption, under which they pay either the "domiciliary intangible tax" or the "business situs intangible tax" but never both, the rewritten statute is indistinguishable from those struck down in *Armco* and *Tyler Pipe*. Just as in those cases, Florida's taxing scheme overtly discriminates against those engaged in interstate commerce, who receive no comparable protection against multiple taxation.

Second, the state disparages the internal consistency test, urging the Court in effect to discard it as an instrument of Commerce Clause analysis in this case. But the state's argument rests on the erroneous assumption that subjecting interstate commerce to a discriminatory *risk* of double taxation, as opposed to actual double taxation, is constitutionally benign. This Court's decisions recognize that even the threat of multiple taxation imposes costs that can interfere with free trade among the states. Moreover, an actual double taxation standard not only would necessitate an impractical inquiry into the constantly changing tax laws of many other states, but also would produce a patchwork in which a logically defective tax would apply to some interstate businesses and not to others, depending on the identity of the other states in which they do business.

Third, in a frontal assault on the most fundamental of Commerce Clause precepts, the state asserts that intangible property arising out of interstate commerce may properly be subject to cumulative unapportioned taxation by every state that contributes to its value. The state's theory is grounded in a misunderstanding of this Court's due process decisions: while they hold that more than one state may provide benefits and protections to the same intangible property sufficient to confer taxing jurisdiction, they do not address the need for apportionment in such circumstances, nor do they consider any question of interference with interstate commerce. Under the Court's Commerce Clause decisions, when a tangible or

intangible asset has a taxable nexus with more than one state, apportionment is required precisely to *avoid* multiple taxation of interstate commerce.

We address each of these points in turn. We also answer the state's belated argument that appeal does not lie in this case because the judgment under review, though concededly "entered" (for purposes of the statutory savings clause) before the change in this Court's mandatory appellate jurisdiction took effect, gave rise only to an "inchoate" appeal right that did not ripen until after denial of discretionary review by the Florida Supreme Court.

I. THIS COURT SHOULD REVIEW THE TAX ACTUALLY IMPOSED BY THE FLORIDA LEGISLATURE, NOT THE REFORMULATED VERSION PUT FORWARD BY APPELLATE COUNSEL

In its effort to portray the Florida tax as internally consistent, the state performs an "act of mental gymnastics," *Nippert v. City of Richmond*, 327 U.S. 416, 423 (1946), first bisecting the tax into two supposedly separate taxes and then construing one of those two taxes to eliminate a feature that would otherwise make it internally inconsistent even standing alone. The state has no legitimate basis for rewriting the statute to suit its litigation objectives.

Florida's tax on intangible property is levied under a single section of a single statute. Fla. Stat. § 199.032 (1983). The state cites neither a textual basis in that statute nor a judicial or administrative interpretation to support its bifurcation of the tax into a "domiciliary" tax and a "business situs" tax. The state court decisions applying the tax give not the slightest hint that the statute imposes two taxes rather than one. *See, e.g., Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976); *State ex rel. Seaboard Air Line R. Co. v. Gay*, 35 So. 2d 403 (Fla. 1948) (en banc); *Starkey v. Carson*, 189 So. 385 (Fla. 1939).

Nor is there any foundation for the state's reconfiguration of the "business situs" definition. The statute pro-

vides that intangible property has a "business situs" in Florida if it arises out of a "sale" of personal property in the state. Fla. Stat. § 199.112(1) (1983). "Sale" ordinarily means a transfer of ownership. Until 1977, the state believed that it had no authority under that provision to tax intangibles arising out of a sale "with an f.o.b. point other than Florida." J.S. App. 12; *see also* J.A. 7. In that year, the legislature added a new sentence to the statute specifying that a sale is "in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale." Fla. Stat. § 199.112(1) (1983). The legislature sought to "prevent out-of-state sellers [from] avoiding the intangibles tax by shipping goods into Florida from an FOB point out of the state." Fla. H. Rep. Comm. on Finance & Taxation, Fiscal Note No. 2256 (Apr. 29, 1977). It anticipated that the change would give "Florida producers . . . a slight competitive advantage." *Id.* The amendment plainly was intended to expand the reach of the tax, not to constrict it.

The state apparently recognizes that the resulting "business situs" definition, even standing alone, violates the internal consistency test. If every state were to adopt the same provision, an interstate company would pay two taxes on the full value of its intangible property, one to the state in which the underlying sale takes place and one to the state to which the property is delivered; an intrastate company whose sales and deliveries take place in a single state would pay only one tax. Florida therefore asserts, for the first time since this litigation began and in conflict with its position in the state administrative proceeding, that the statute does "not treat sale and delivery as alternative bases for finding a business situs" and that a transfer of ownership within the state does not qualify as a "sale" if "delivery was to occur outside Florida as part of the sale." Br. 24.¹ The state cites nothing to

¹ Ford specifically asked the state in an interrogatory whether the tax applies to an intangible arising out of a sale in Florida if "the property is shipped from Florida (F.O.B. Florida) to another

support its bare declaration that the 1977 legislation, instead of expanding the reach of the state's intangible property tax, actually narrowed it by excluding transfers of ownership within the state.

Although the Court should view skeptically the state's eleventh-hour statutory reconstruction, the definition of "business situs" is not central to the issues in this case. Even if Florida's current interpretation were accepted, the statute would remain internally inconsistent. If the same statute were enacted by every state, an interstate company would still pay multiple taxes on the same intangible property—one to its state of domicile and another to the state in which the underlying tangible property was delivered—while an intrastate company would pay only a single tax to its state of domicile. The state's redefinition of "business situs" would mean only that an interstate company in such circumstances would not have to pay a third tax to the state in which the sale itself took place. Double taxation of interstate commerce is no more permissible than triple taxation.

II. FLORIDA'S TWO-TAX THEORY BRINGS THIS CASE SQUARELY WITHIN *ARMCO* AND *TYLER PIPE* AND THUS CONFIRMS THAT ITS TAXING SCHEME IS INVALID

Far from masking the statute's constitutional defect, dividing the tax into a "business situs intangible tax" and a supposedly separate "domiciliary intangible tax" merely accentuates its facial discrimination against interstate commerce. Under the state's theory, a Florida

state pursuant to the terms of the contract for sale." J.A. 13. The state responded that the tax would apply. J.A. 18. It now says that its interrogatory response was intended to address only the "domiciliary" tax, which applies to all intangibles owned by a Florida domiciliary "without regard to business situs." Br. 7 n.5. But the interrogatory obviously focused on the state's definition of "business situs." The state's current reading of the response makes its nonsensical. Since domicile alone is always a sufficient basis under the Florida statute for taxing an intangible, it would have been no answer to Ford's questions about business situs to respond solely in terms of the tax on domiciliaries.

domiciliary engaged in purely intrastate commerce never pays more than one of those two taxes. For example, a local bank that finances an automobile in Florida pays only the "domiciliary" tax; it pays no "business situs" tax, even though the intangible has a Florida "business situs." By contrast, an out-of-state company competing with the Florida bank must pay the "business situs" tax regardless of whether it pays a domiciliary tax to its home state.

That makes this case indistinguishable from *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). West Virginia imposed a wholesale gross receipts tax but exempted local manufacturers who were subject to a separate manufacturing tax. The result was that "two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* at 642. Moreover, "[i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then [manufacturers] from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* at 644.

At issue here is a property tax, not a transactional tax, but the practical effect is identical. Two companies financing sales of tangible property in Florida are treated differently depending on whether the taxpayer is a Florida domiciliary or an out-of-state domiciliary. Only the latter pays Florida's "business situs" tax; the former is exempt. Likewise, if any other state were to impose a domiciliary tax like Florida's, a company domiciled in the other state would pay both a domiciliary tax to its home state and a business situs tax to Florida on the same intangible property, while a Florida domiciliary would pay only the Florida domiciliary tax. As in *Armco*, the statute here facially discriminates against interstate commerce in favor of intrastate commerce.

Inverting the exemption makes no difference. If Florida domiciliaries are considered exempt from the

"domiciliary" tax rather than from the "business situs" tax, the case becomes indistinguishable from *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). As in *Armco*, the state in *Tyler Pipe* imposed both a manufacturing and a wholesaling tax and provided that local manufacturers subject to one need not pay the other. Unlike West Virginia, however, Washington exempted local manufacturers from the manufacturing tax rather than from the wholesaling tax. Despite that difference in form, the Court concluded that the Washington scheme "has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*." *Id.* at 240. The statute "exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." *Id.* at 248.

The same is true here. Florida's statute exposes to multiple tax burdens companies that have an out-of-state domicile or whose intangibles have an out-of-state business situs. It exempts from that multiple burden only Florida domiciliaries whose intangibles have an in-state business situs. As in *Tyler Pipe*, the Florida scheme impermissibly "eliminat[es] the risk of multiple taxation" only for Florida companies engaged in intrastate commerce, but not for "similarly situated" companies engaged in interstate commerce. *Id.* at 246.²

² Florida seems strangely blind to the obvious parallel. It describes *Tyler Pipe* in these words: "Washington required all out-of-state manufacturers to pay a tax when they sold their goods in the state, without offset for any manufacturing tax they incurred, while in-state manufacturers were granted such an offset, thus disfavoring the out-of-state manufacturers who competed for sales in Washington." Br. 28-29. But Florida's tax can be described identically, merely by substituting "Florida" for "Washington" and "domiciliary" for "manufacturer": "Florida requires all out-of-state domiciliaries to pay a tax when they finance a sale of goods in the state, without offset for any domiciliary tax they incur, while in-state domiciliaries are granted such an offset, thus dis-

The state argues that a different result is warranted here because Florida's bifurcated "business situs" tax, unlike the West Virginia and Washington taxes, supposedly "contains no pertinent exemptions." Br. 27-28. While neither the Florida statute as written nor the state's reconstruction of it uses the word "exemption," Florida domiciliaries pay either the "domiciliary" tax or the "business situs" tax, but never both. Whether that reduced exposure to taxation is called an "exemption" or something else is of no consequence. Indeed, as far as the Court's opinions reveal, neither of the offending statutes in *Armco* and *Tyler Pipe* used the word "exemption."³

Florida's claim that its "business situs" tax "readily passes the internal consistency test" (Br. 28) does not distinguish this case from *Tyler Pipe*. Washington's wholesaling tax, considered in isolation from the manufacturing tax, likewise would have passed the internal consistency test: if every state adopted a wholesaling tax identical to Washington's, interstate wholesalers would bear no greater tax burden than would intrastate wholesalers. But *Tyler Pipe* squarely rejects Florida's unstated premise. The Court's decision demonstrates that internal consistency analysis is not conducted in a vacuum. When the interaction of two different taxes confers on intrastate commerce an exemption or other benefit that is unavailable to interstate commerce, the Court views the taxes together.

favoring the out-of-state domiciliaries who compete for financing business in Florida." The state's own description of *Tyler Pipe* thus demonstrates that the facially discriminatory feature of the Washington tax infects the Florida tax as well.

³ The West Virginia statute provided that a local manufacturer "shall not be required to pay" the wholesaling tax. 467 U.S. at 640 n.3. The Washington statute provided that persons taxable under the wholesaling tax "shall not be taxable" under the manufacturing tax. 483 U.S. at 237 n.8.

III. THE INTERNAL CONSISTENCY TEST SERVES AN IMPORTANT ROLE IN PROTECTING INTER-STATE COMMERCE FROM DISCRIMINATORY STATE TAXES

Florida repeatedly impugns this Court's internal consistency test as a "mechanical" abstraction that ignores real economic effects. (*E.g.*, Br. 18, 34, 36, 37. At the core of its objection is the mistaken notion that the risk of multiple state taxation is a merely "hypothetical" injury that constitutes "no actual impediment to interstate commerce." Br. 34. As this Court often has recognized, however, the free trade purpose of the Commerce Clause is jeopardized when "[i]nterstate commerce [is] subjected to the risk of a double tax burden to which intrastate commerce is not exposed." *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (emphasis added). See also, *e.g.*, *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-63 (1948); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439-40 (1939).

There are several reasons for that rule. First, risks are not cost-free. An interstate business that faces the potential burden of multiple taxation must price its goods or services to reflect that possibility. If its intrastate competitors face no comparable risk, the company may suffer a competitive disadvantage that would discourage it from engaging in interstate commerce. As Justice Rutledge observed, the "uncertainties" resulting from the "threat" of multiple taxation can produce "the same impeding consequences" as the actual incidence of multiple taxation. *Freeman v. Hewit*, 329 U.S. 249, 274 (1946) (Rutledge, J., concurring).

That observation is particularly apt here. In the financial services industry, where the difference between success and failure often is measured in terms of a "basis point" (one hundredth of one percent in the yield

of an investment), the risk that more than one state will seek to tax the full value of an intangible asset imposes a real cost that can affect the way companies conduct their business. Florida's insensitivity to that cost is revealed in its assertion that a tax of one mill is "small." Br. 34 n.26. But a mill is the equivalent of 10 basis points. In a highly competitive environment, a company that must bear the risk of a second or third such "small" tax may be significantly handicapped. Thus, when Ford competes with local Florida banks for retail financing contracts (J.A. 11), it must factor into the calculation of its return the prospect that another state might, during the life of the contract, impose an annual tax like Florida's on the same intangible asset. Because the local bank bears no comparable risk, it enjoys a cost advantage that may give it a decisive competitive edge.⁴

Second, the risk of multiple taxation is likely to become a reality if this Court sustains an internally inconsistent tax like Florida's. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963). A state tax approved by this Court serves as a convenient recipe for other states seeking new revenue sources, because "[i]f [one state] is free to exact . . . a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 439. See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48 (1940). That is why "[t]he jurisdiction of [one state] to tax 'must be determined on a basis which is consistent with the like jurisdiction of other States.'"

⁴ The unfairness of Florida's tax is exacerbated by a provision of the Florida Income Tax Code that allows banks a dollar-for-dollar credit against their franchise tax liability for any intangible property taxes paid under the provisions at issue in this case. Fla. Stat. § 220.68 (1983). (The credit was limited to 40 percent of the bank's franchise tax liability during the years in issue. The limit was recently increased to 65 percent.) The upshot is that Florida not only protects local banks against the risk of double taxation on its intangibles, but also effectively insulates them even from single taxation.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 326 (1944) (Stone, C.J., dissenting) (quoting *Johnson Oil Ref. Co. v. Oklahoma*, 290 U.S. 158, 162 (1933)).

Finally, to hold that only the actual imposition rather than the inherent risk of double taxation warrants invalidating a state tax “would mean that the constitutionality of [one state’s] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.” *Armco*, 467 U.S. at 644-45.

Florida’s claim that Ford seeks to “extend” the internal consistency test beyond its proper bounds (e.g., Br. 17, 26, 30) is actually a thinly veiled assault on the test itself. The scope and application of the test have been thoroughly debated in the Court’s recent opinions, and Florida’s arguments are largely indistinguishable from the views expressed by the dissenting Justices in those cases. The state argues, for example, that applying the internal consistency test is “contrary to the practical, realistic approach reflected in *Complete Auto*” (Br. 18)—a point that echoes the dissenting opinion in *Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting). Similarly, Florida questions the soundness of the internal consistency test because it would eliminate some but not all risk of double taxation (Br. 18)—an argument that draws upon the dissenting opinion in *Tyler Pipe*, 483 U.S. at 258-59 (Scalia, J., dissenting), and that we addressed in our opening brief (pp. 27-28).

Applying the internal consistency test here requires no extension of the doctrine. To the contrary, the concerns that some Justices have expressed about previous applications of the test are not present in this case. For example, Florida’s statute, like those in *Armco* and *Tyler Pipe*, is facially discriminatory—it overtly insulates from multiple taxation only the state’s own domiciliaries who confine their activities within the state’s boundaries. The Court therefore need not go as far as it did in *American Trucking Ass’n v. Scheiner*, 483 U.S. 266 (1987), where

it applied the internal consistency test to invalidate a flat highway tax that concededly was “not . . . facially discriminatory.” *Id.* at 281 (emphasis added). Compare *id.* at 302-03 (O’Connor, J., dissenting) (objecting to use of internal consistency test where tax is not facially discriminatory) with *Tyler Pipe*, 483 U.S. at 253 (O’Connor, J., concurring) (agreeing with use of internal consistency test where tax is facially discriminatory).

Furthermore, the intangible property tax at issue here, unlike the transactional taxes at issue in *Armco* and *Tyler Pipe*, resembles an income tax in the sense that property, like income, can have only a single, unitary value. If more than one state contributes to that value and therefore has jurisdiction to tax it, the internal consistency test plays an important role in protecting the asset from taxation on more than 100 percent of its value. This is a far clearer case for applying an internal consistency analysis than a case involving a tax on “discrete events” where “there is simply no unitary figure or event to apportion.” *Tyler Pipe*, 483 U.S. at 256 (Scalia, J., dissenting). See also *Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting).

Even Florida grudgingly acknowledges in the end that the internal consistency test has a proper function. It admits that, “when a state puts forward a basis of taxation, it must be internally consistent in following the logic of that basis of taxation.” Br. 36; see also Br. 18, 29, 30. That concession is fatal to the state’s case, because Florida does not follow the logic of its statute. By taxing the full value of all intangibles owned by its domiciliaries, regardless of business situs, Florida asserts a theory of taxing jurisdiction under which the state of domicile alone provides the benefits and protections that give rise to intangible values. It is utterly inconsistent with the logic of that theory for Florida simultaneously to tax intangibles owned by non-domiciliaries under a “business situs” theory. If a domiciliary state may tax intangible values in full because it alone contributes to

the creation of those values, a business situs state may tax those values not at all. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 443 (1979). Alternatively, if Florida's theory were that both a domiciliary state and a business situs state contribute to the value of intangible property and therefore that both can tax them, the "logic" of its tax would require an apportionment mechanism that its current statute lacks.

IV. THE COMMERCE CLAUSE DOES NOT PERMIT MULTIPLE TAXATION OF INTANGIBLES THAT ARISE OUT OF INTERSTATE COMMERCE

That brings us to Florida's final and most extreme argument. The state flatly asserts that "double taxation [of intangibles] is entirely consistent with constitutional principles." Br. 31. If so, under the state's analysis, the internal consistency test, which is designed to prevent double taxation of interstate commerce, should have no application to an intangible property tax.

The state's theory is that in the case of intangibles, which have no single identifiable situs, "domicile and situs states afford different protections, benefits, and privileges for which each may demand a return." Br. 31. But it hardly follows that each may demand an *unapportioned* return. As this Court stated in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 446 (1980)—a case that involved income from intangible property—when an object of taxation "bears relation to benefits and privileges conferred by several States, . . . apportionment is ordinarily the accepted method." Long before *Mobil*, the Court applied the same apportionment principle to a tax on the intangible property itself. In *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185 (1897), the Court held that intangible property may be taxed by states other than the owner's state of domicile. Because a number of different states may contribute a "proportionate share of the value of the entire property," the owner may be subject in each state to "such burden of taxation as a *fair distribution* of the actual value of their property among those states requires." *Id.* at 224, 225 (emphasis added).

Florida's mistaken notion that intangible property may be subjected to multiple unapportioned taxation can be traced to three principal misconceptions. First, it misreads several of this Court's due process decisions, erroneously inferring that they excuse states from any need to apportion a tax on intangible property. Br. 23. As we discussed in our opening brief (pp. 36-38), the issue in the due process cases was jurisdictional—whether a non-domiciliary state had a sufficient connection with intangible property to levy a tax either on the property itself, *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U.S. 346 (1911); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395 (1907), or on its transfer at death. *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357 (1939); *Blackstone v. Miller*, 188 U.S. 189 (1903). In none of these cases did the Court consider or decide any issue of apportionment, and in none did it address any question under the Commerce Clause.⁵

⁵ The state also relies (Br. 17, 30-31, 33) on several individual income tax cases in which the Court upheld the authority of a state either to tax in full the income of residents from both in-state and out-of-state sources, *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932), or to tax the income of non-residents from their property or business within the state. *Shaffer v. Carter*, 252 U.S. 37 (1920). The focus of each case was on territorial taxing jurisdiction under the Due Process Clause. No question of apportionment was considered or addressed in any of them. The only mention of the Commerce Clause was in *Shaffer*, where the Court rejected a subsidiary argument predicated on the assumption any tax on interstate commerce would be invalid. *See id.* at 57.

Florida makes much of its observation (Br. 33) that the statute in *Shaffer* was internally inconsistent—the state there taxed both the income of its resident individuals from all sources and the income of non-resident individuals from sources within the state. *Id.* at 44-45. But the decision is of no use to Florida here. First, the multiple burdens doctrine and the internal consistency test derive from the Commerce Clause, and the taxpayer in *Shaffer* did not raise a Commerce Clause objection to the internally inconsistent feature of the statute. Second, the same statute today, if applied to a multistate business enterprise, would be struck down under both

Second, the state wrongly believes that, under this Court's decisions, "multiple taxation is permissible" when "attributable to a state's special power to tax on the basis of domicile." Br. 30. In the words of Chief Justice Stone, however, "[w]hile the existence of a business domicile has been thought to afford a basis for the state taxation of intangibles, on the theory that they have become localized there, . . . the taxation of intangibles of interstate [companies] is subject to the rule of apportionment *wherever the tax without it would subject the commerce to the burden of multiple state taxation.*" *Northwest Airlines, Inc. v. Minnesota*, 332 U.S. at 318 (Stone, C.J., dissenting) (emphasis added) (citing *Southern Ry. v. Kentucky*, 274 U.S. 76, 81 (1927); *Wallace v. Hines*, 253 U.S. 66, 69-70 (1920); *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 300 (1912); *Fargo v. Hart*, 193 U.S. 490, 499 (1904); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. at 223-25).⁶

due process and Commerce Clause principles, which prohibit a state from taxing without apportionment income derived from sources both inside and outside the taxing state's borders. See, e.g., *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 164 (1983); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 445-46; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Finally, to the extent that *Shaffer* can be construed to have approved under the Commerce Clause an internally inconsistent income tax, its authority must be questioned in light of this Court's recent internal consistency decisions.

⁶ The Court in *Northwest Airlines* upheld, under a version of the "home port" doctrine, an unapportioned Minnesota tax on the entire fleet of airplanes used by a Minnesota domiciliary in interstate commerce. The rationale of the decision was substantially eroded in *Braniff Airways, Inc. v. Nebraska Bd. of Equalization*, 347 U.S. 590 (1954), which held that a non-domiciliary state could impose an apportioned tax on the value of an interstate air carrier's flight equipment. The "home port" doctrine, at least for moving equipment other than oceangoing vessels, "has yielded to a rule of fair apportionment among the States." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 442. The Court has treated Chief Justice Stone's dissenting opinion in *Northwest Airlines* as an accurate statement of current Commerce Clause doctrine. *Id.* at 443, 452 n.17, 455.

Third, Florida is under the mistaken impression that "the Commerce Clause has never before even been applied to an intangible property tax." Br. 33 n.25; see also Br. 23 n.15. On the contrary, this Court long ago invalidated under the Commerce Clause a property tax that purported to reach intangible values not properly within the state's taxing jurisdiction, thereby "throw[ing] an unconstitutional burden on commerce among the states." *Fargo v. Hart*, 193 U.S. at 502. And in *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891)—a case that Florida simply ignores in its brief—the Court applied an early version of internal consistency analysis in upholding against Commerce Clause challenge an ad valorem tax on a company's capital stock, an asset that includes intangible values.

In sum, there is no basis in this Court's precedents for Florida's assertion that intangible property should be left open to multiple state taxation. When interstate commerce is subject to "cumulative burdens not imposed on local commerce"—regardless of whether the burden attaches to income, to discrete transactions, or to tangible or intangible property—the effect is to "renew the barriers to interstate trade which it was the object of the commerce clause to remove." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938). Intangible property that arises out of interstate commerce and has taxable connections with several states is entitled under the Commerce Clause to the same immunity from discriminatory double taxation that any other object of taxation enjoys.

V. THIS COURT HAS APPELLATE JURISDICTION

When Congress eliminated the appellate review provision of 28 U.S.C. § 1257(2) (1982), it provided that the amendment "shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before [the amendment's] effective date." Pub. L. No. 100-352, § 7, 102 Stat. 664 (1988). Under the terms of that savings clause, this Court has

appellate jurisdiction if the "judgment or decree" under review was "entered" before September 25, 1988. Because the judgment under review in this case was entered by the Florida District Court of Appeal on September 13, 1988, this Court's jurisdiction over the appeal was not affected by the 1988 amendment.

At the jurisdictional stage, the state argued that the judgment of the Florida District Court of Appeal was not "entered" for purposes of the savings clause until after rehearing was denied by that court. Motion to Dismiss or Affirm at 10-12. In its brief on the merits, the state expressly abandons that argument (Br. 3 n.1) and substitutes a new one. Florida now asserts that the "judgment or decree" under review, for purposes of the savings clause, is not the District Court of Appeal's judgment of September 13, 1988, but rather the Florida Supreme Court's denial of discretionary review on February 22, 1989. Br. 4-5.⁷

Florida correctly acknowledges that "the state court 'judgment[] or decree[]' that is 'reviewed' under Section 1257 in circumstances like the present is the final state court decision on the merits, even if rendered by an intermediate appellate court, and not the denial of discretionary review by the state supreme court." Br. 3. See, e.g., *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954); *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). The state accordingly concedes that, if the phrase "judgment or decree" as used

⁷ Both arguments flatly contradict the state's prior assertion in the Florida Supreme Court that the case falls within this Court's mandatory appellate jurisdiction. The state opposed Ford's petition for discretionary review in the Florida Supreme Court on the ground that the constitutional issue should be left for resolution by this Court. Central to the state's argument was its unqualified declaration that Ford "will be free to file a direct appeal (not a petition for certiorari)" and that "[t]his appeal will consist of a review on the merits regardless of whether the U.S. Supreme Court grants oral argument." Brief of Respondent on Jurisdiction at 3 (Nov. 28, 1988). The state was right then and is wrong now.

in the savings clause "were to borrow its meaning" from 28 U.S.C. § 1257, "the appeal here would be proper." Br. 3. The state argues, however, that the savings clause should be understood to "borrow its meaning" instead from 28 U.S.C. § 2101(c). Under its theory, because the time for taking an appeal "does not begin to run in circumstances like the present until the denial of discretionary review by the state supreme court," that denial, rather than the intermediate appellate court's final decision on the merits, constitutes the "judgment or decree" for purposes of section 2101(c) and, derivatively, for purposes of the savings clause as well. Br. 3-5.

The argument is unsound. First, when Congress uses a phrase in an *amending* statute that is identical to a phrase in the *amended* statute, one may reasonably infer that it intended the two phrases to have the same meaning. 1A *Sutherland Statutory Construction* § 22.33, at 288 (4th ed. 1985); see *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988); *Blair v. Chicago*, 201 U.S. 400, 454-55 (1906). The legislation that eliminated this Court's appellate jurisdiction amended section 1257, not section 2101(c). The terms of the savings clause confirm that Congress meant to refer to the former rather than the latter. It preserves the "right to review" and the "manner of reviewing" a judgment, subjects dealt with by section 1257. It says nothing about the time for reviewing a judgment, the only subject dealt with by section 2101(c). There is no reason to suppose that Congress meant to refer in the savings clause to a "judgment or decree" different from the "judgment or decree" that would have been appealable under former section 1257.

Second, the state misapprehends this Court's decisions under section 2101(c). The Court has not construed the phrase "judgment or decree" as used in that section to mean an order denying discretionary review. It has held

only that, for obvious pragmatic reasons, the time for taking an appeal or filing a petition for a writ of certiorari is "tolled" or "suspended" while a petition for discretionary review, or a petition for rehearing, is pending. *E.g.*, *Communist Party v. Whitcomb*, 414 U.S. 441, 445 (1974); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942); *American Ry. Express Co. v. Levee*, 263 U.S. at 21. This Court's Rule 13.1 codifies that principle. It provides that a petition for a writ of certiorari seeking review of a judgment of a lower state court "shall be deemed in time" if filed within 90 days after entry of an order denying discretionary review. A "tolling" or "deeming" rule does not amount to a determination that the phrase "judgment or decree" refers to the state supreme court's order denying discretionary review rather than the intermediate court's judgment on the merits.

Congress could have drawn a different line. It might have preserved only those appeals actually docketed before the new legislation's effective date. It might even have adopted Florida's more obscure approach and saved only those appeals in which a "still-partly-inchoate right of eventual review" had "fully ripened" by the effective date. Br. 4. But it chose instead a bright-line test that focuses solely on the date of the judgment to be reviewed by this Court. If that judgment was entered before the amendment's effective date, as it was in this case, this Court has jurisdiction over the appeal.⁸

⁸ Even if the Court were to conclude that appeal does not lie under section 1257, it would be free to decide the merits under its certiorari jurisdiction. Given the importance of the Commerce Clause issue, the tension between the decision below and this Court's precedents, the state's belated objection to appellate jurisdiction (after it successfully urged the contrary position below), and the fact that the case has now been fully briefed, it is plainly appropriate for the Court to proceed with plenary review. *Cf. City of Canton v. Harris*, 109 S. Ct. 1197, 1202-03 (1989); *St. Louis v. Prapotnik*, 485 U.S. 112, 120-21 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

CONCLUSION

The judgment of the Florida District Court of Appeal should be reversed.

Respectfully submitted,

JAMES E. TRIBBLE
BLACKWELL & WALKER, P.A.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

MARK L. EVANS
Counsel of Record
ALAN I. HOROWITZ
PATRICIA M. LACEY
ANTHONY F. SHELLEY
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

Counsel for Appellant

Of Counsel:

FRANK A. STOCKING
JOHN P. VAN DUSEN
JOHN M. NEBERLE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
(313) 323-0537

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.
DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

BRIEF OF THE
COMMITTEE ON STATE TAXATION OF THE COUNCIL
OF STATE CHAMBERS OF COMMERCE AND THE
AMERICAN FINANCIAL SERVICES ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF APPELLANT

Of Counsel

FRANK M. SALINGER
General Counsel
ROBERT E. MCKEW
Assistant General Counsel
AMERICAN FINANCIAL SERVICES
ASSOCIATION
1101 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 289-0400

AMY EISENSTADT *
Tax Counsel
JAMES F. BURESH
PAUL H. FRANKEL
Chairmen, Lawyers Coordinating
Subcommittee
COMMITTEE ON STATE TAXATION
OF THE COUNCIL OF STATE
CHAMBERS OF COMMERCE
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-8103

Dated: August 10, 1990

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTORY STATEMENT	1
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FLORIDA TAX VIOLATES THE INTERNAL CONSISTENCY TEST, AND THEREFORE, VIOLATES THE COMMERCE CLAUSE	4
II. THE INTERNAL CONSISTENCY TEST, AS DEVELOPED BY THIS COURT, APPLIES TO AN INTANGIBLE PROPERTY TAX	6
III. THE FLORIDA INTANGIBLE PROPERTY TAX INHIBITS INTERSTATE COMMERCE BY BURDENING FINANCING TRANSACTIONS OF INTERSTATE BUSINESS	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Page

<i>American Trucking Association, Inc. v. Scheiner</i> , 483 U.S. 266 (1987)	3, 7
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	7
<i>Ashland Oil, Inc. v. Caryl</i> , 58 U.S.L.W. 3032 (June 28, 1990)	3
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	8
<i>Boston Stock Exchange v. State Tax Commission</i> , 429 U.S. 318 (1977)	4, 8
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977), <i>reh'g denied</i> , 430 U.S. 976 (1977) ..	3, 4
<i>Container Corp. of America v. Franchise Tax Board</i> , 463 U.S. 159, <i>reh'g denied</i> , 464 U.S. 90 (1983)	3, 4, 6, 7
<i>Goldberg v. Sweet</i> , 109 S. Ct. 582 (1989)	3, 4
<i>Northwestern States Portland Cement Co. v. State of Minnesota</i> , 358 U.S. 450 (1959)	4
<i>Pullman's Palace Car Company v. Pennsylvania</i> , 141 U.S. 18 (1891)	6, 7
<i>Tyler Pipe Industries v. Washington Department of Revenue</i> , 483 U.S. 232 (1987)	7

CONSTITUTION AND STATUTES

U.S. Const., art. I § 8, cl. 3	<i>passim</i>
Fla. Stat.	
§ 199.112(1) (1983)	5
§ 199.052 (1983)	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 88-1847

FORD MOTOR CREDIT COMPANY,
v. *Appellant*,
DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
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BRIEF OF THE
COMMITTEE ON STATE TAXATION OF THE COUNCIL
OF STATE CHAMBERS OF COMMERCE AND THE
AMERICAN FINANCIAL SERVICES ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF APPELLANT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce and the American Financial Services Association as *amici curiae* in support of the appellant in the above-captioned case and supporting reversal of the decision of the District Court of Appeal of Florida. Written consents of the appellant and the appellee have been obtained and filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of com-

merce. The Committee on State Taxation (COST), one of three advisory committees of the Council, consists of 354 corporate members. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

COST members are engaged in a diverse range of manufacturing, retailing and financial pursuits. Many of these companies are involved in extensive financing transactions that result in intangibles that are subject to taxation under a system such as that imposed in Florida. Moreover, all COST member companies, due to their interstate character, have an interest in this case which presents an issue regarding the role of the internal consistency test in Commerce Clause jurisprudence. COST is, therefore, vitally interested in a case such as this which presents issues significantly affecting state taxation of interstate commerce.

The American Financial Services Association (AFSA) is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 402 companies operating 10,970 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies. Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over \$142 billion of consumer credit outstanding and over \$50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The Appellant and other major automotive sale finance companies are members of AFSA and engage in transactions that result in intangibles subject to taxation under the Florida system. The vast majority of consumer

credit and wholesale financing are interstate in nature and are directly affected by such taxation.

SUMMARY OF ARGUMENT

At issue in this case is whether the Florida tax on intangible property violates the Commerce Clause in that it fails the internal consistency test, and, therefore, fails the fair apportionment and discrimination portions of the Commerce Clause test set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *reh'g denied*, 430 U.S. 976 (1977). This Court has held that whether a tax is fairly apportioned is determined by examining whether it is internally and externally consistent. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), *reh'g denied*, 464 U.S. 909 (1983). The internal consistency test has been applied by this Court in many contexts, *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 283, 284 (1987), and to various tax types.

The internal consistency test is one of fairness, *Container, supra*, at 169. It simply requires that a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. *Goldberg v. Sweet*, 488 U.S. —, 109 S. Ct. 582, 589 (1989). The test ensures that a particular tax, on its face, will not result in multiple taxation in violation of the Commerce Clause. The viability of the internal consistency test and the appropriateness of extending this test to various tax types was most recently recognized by this Court in *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3032 (June 28, 1990).

When the internal consistency test is applied to Florida's intangibles tax, it is clear that the tax violates that test, and therefore, violates the Commerce Clause. Therefore, the decision of the Florida court must be reversed.

ARGUMENT

I. THE FLORIDA TAX VIOLATES THE INTERNAL CONSISTENCY TEST, AND, THEREFORE, VIOLATES THE COMMERCE CLAUSE

While States may tax interstate commerce, they may not, consistent with the Commerce Clause, impose taxes which discriminate against interstate commerce by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 458 (1959). This follows inexorably from the basic purpose of the Commerce Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977).¹ In order to enforce the protections offered by the Commerce Clause, this Court has developed a four-prong test, under which a State tax will be found Constitutional if it: 1) has a substantial nexus with the state; 2) is fairly apportioned to the activities carried on by the taxpayer in the state; 3) is nondiscriminatory; and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). At issue in the instant case is the second prong of the *Complete Auto* test, whether the Florida intangibles tax is fairly apportioned.

In determining whether a particular tax is fairly apportioned, this Court, in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 *reh'g denied*, 464 U.S. 90 (1983), stated that "[t]he first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency . . .". Internal consistency requires that a tax be structured so that if every State were to impose an identical tax, no multiple taxation would result. *Goldberg v. Sweet*, 109 S. Ct. at 589. The Florida intangibles tax is structured so that if every State were to im-

pose the same tax, multiple taxation would result. Therefore, the tax is not fairly apportioned and, on its face, fails the Commerce Clause requirements as set forth by this Court.

Florida imposes its intangible tax on domestic and foreign corporations. In the case of a foreign corporation, this tax is imposed on all accounts receivable:

wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state . . . it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid . . . Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state. . . . Fla. Stat. Sec. 199.112(1) (1983).

Thus, if a corporation domiciled in Michigan manufactures a product in Michigan, approves a purchase loan in Michigan, retains the loan documents in Michigan, receives and processes the loan payments in Michigan and merely delivers the product to the purchaser in Florida, Florida deems the entire value of the Michigan corporation's intangibles to be located in Florida for purposes of its intangible tax.

A Florida domiciliary corporation is required to pay the tax on all intangible property it owns, regardless of the location of the intangibles. Fla. Stat. Sec. 199.052 (1983). Florida's tax scheme, if imposed by other States, would result in multiple taxation in violation of the internal consistency test.

If Michigan, the commercial domicile of petitioner in the instant case, enacted a tax identical to that of Florida, all of petitioner's intangibles would be subject to tax by Michigan. However, under the Florida statute, intangibles that result from sales deemed to be Florida sales would also be subject to tax by the State of Florida on their unapportioned value.

Moreover, under the language of the Florida statute, an intangible is deemed to be a Florida sale and subject to tax by Florida even if the property securing the intangible is moved from the State. Thus, if an individual took delivery of property in Florida from a seller in Michigan and that individual subsequently moved the property to a third state which also imposed a tax on intangibles situated in that state, the single intangible would be subject to tax on its entire value in three states! When the internal consistency test is applied to the Florida intangibles tax, it is clear that the tax would result in double or even greater multiple taxation. Therefore, the tax on its face fails the internal consistency test.

II. THE INTERNAL CONSISTENCY TEST, AS DEVELOPED BY THIS COURT, APPLIES TO AN INTANGIBLE PROPERTY TAX

This Court first used the term "internal consistency" in reference to whether a particular tax violates the Commerce Clause in *Container Corporation of America, supra*. In *Container*, this Court was considering whether an apportionment formula to be applied to the income for a unitary business was Constitutional. The Court stated that, under the Commerce Clause, an apportionment formula must be fair, stating further that:

[t]he first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.

Id. at 169.

While the term "internal consistency" may not have been expressly used by this Court prior to its decision in *Container*, the Commerce Clause theory it represents had long been recognized by this Court. In *Pullman's Palace Car Company v. Pennsylvania*, 141 U.S. 18

(1891), the taxpayer challenged, on Commerce Clause grounds, Pennsylvania's imposition of its capital stock tax by apportioning the taxpayer's capital using a formula of the number of miles of Pennsylvania railroad over the total miles of railroad used by its cars. This court approved that apportionment formula as it "was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the value of its capital stock, and no more." *Id.* at 26 (emphasis added). This is the same internal consistency test applied by this Court in *Container*.

Most importantly to the instant case, in *Pullman's Palace* this Court found that the tax at issue was "in substance and effect, a tax on . . . property." *Pullman's Palace, id.* at 25. Thus, not only did this Court apply the internal consistency test in a Commerce Clause context 100 years ago, but it also applied it to a tax it considered a property tax.

Further, this Court has recently explicitly applied the internal consistency test in contexts other than unitary income taxation. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *American Trucking, id.* at 283, 284, Pennsylvania's annual flat taxes on the operation of trucks within the State was held unconstitutional under the Commerce Clause because the taxes violated internal consistency, thus potentially resulting in multiple taxation. In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987), this Court invalidated similar Business and Occupation taxes imposed by the States of West Virginia and Washington. If every state had a tax similar to those of West Virginia and Washington, manufacturers and wholesalers engaged in interstate business would have a heavier tax burden than wholly in-state manufactures and wholesalers. Therefore, the taxes failed the internal con-

sistency test and were found to violate the Commerce Clause.

This Court has never restricted the application of the internal consistency test to any particular tax type. In fact, the test was first developed as a Commerce Clause requirement in a property tax case and the test has been applied in various tax contexts. In accord with the prior decisions of this Court, the internal consistency test must be applied in determining whether Florida's intangible property tax violates the Commerce Clause in the instant case.

III. THE FLORIDA INTANGIBLE PROPERTY TAX INHIBITS INTERSTATE COMMERCE BY BURDENING FINANCING TRANSACTIONS OF INTERSTATE BUSINESSES

The internal consistency test is vitally important to the national economy. Its role in identifying the potential for multiple taxation is essential in preventing the States from overreaching and placing tax burdens on interstate businesses that they are unwilling to place on domestic businesses. It is the internal consistency test that ensures that a particular tax will not burden interstate commerce in violation of the Commerce Clause.

Clearly, the Florida tax on intangibles is structured to discourage out-of-state businesses from engaging in financing transactions in the State, thereby favoring local finance companies, since an out-of-state business risks multiple taxation that the local business avoids. While competition among the States for a share of interstate commerce is a central element of our free-trade policy, a statute may not tax interstate transactions in order to favor local businesses over out-of-state businesses. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Florida's intangibles tax scheme is structured to provide a disincentive for non-Florida finan-

cing corporations to do business in the State, creating a monopoly for Florida businesses. It is just such commercial advantage to local business that the Commerce Clause is intended to prevent. The internal consistency test is designed to identify tax laws that violate that essential purpose of the Commerce Clause.

The utility of the internal consistency test in providing a first line of defense from discriminatory State taxation has been well demonstrated by the decisions of this Court. Its application to the Florida tax at issue, thereby invalidating that tax, is necessary to prevent multiple and discriminatory taxation of interstate businesses in violation of the Commerce Clause.

CONCLUSION

For the foregoing reason, the Committee on State Taxation and the American Financial Services Association respectfully request that the decision of the First District Court of Appeal of the State of Florida, upholding the constitutionality of the State's tax on intangible property, be reversed.

Respectfully submitted,

Of Counsel

FRANK M. SALINGER
General Counsel
ROBERT E. MCKEW
Assistant General Counsel
AMERICAN FINANCIAL SERVICES
ASSOCIATION
1101 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 289-0400

Dated: August 10, 1990

AMY EISENSTADT *
Tax Counsel
JAMES F. BURESH
PAUL H. FRANKEL
Chairmen, Lawyers Coordinating
Subcommittee
COMMITTEE ON STATE TAXATION
OF THE COUNCIL OF STATE
CHAMBERS OF COMMERCE
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-8103

* Counsel of Record

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In The
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FORD MOTOR CREDIT COMPANY,

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Appellee.

On Appeal From The District Court Of
Appeal Of Florida, First District

BRIEF OF AMICI CURIAE,
CATERPILLAR INC.,
CLARK EQUIPMENT COMPANY,
CHASE MANHATTAN LEASING COMPANY
(MICHIGAN), INC., GENERAL MOTORS
ACCEPTANCE CORPORATION, and GENERAL
MOTORS CORPORATION in Support of Appellant

KENNETH R. HART*
ROBERT A. PIERCE
STEVEN P. SEYMOE of
AUSLEY, McMULLEN, McGEHEE,
CAROTHERS & PROCTOR
Post Office Box 391
Tallahassee, Florida 32302
904/224-9115
*Counsel of Record for
Amici Curiae

QUESTIONS PRESENTED

Appellant, Ford Motor Credit Company, has appealed a decision of the District Court of Appeal of Florida, First District, which held that Florida's intangible property tax does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. Appellant has appealed this decision and raised the following federal questions related to Florida's intangible tax system:

1. Whether this Court's "internal consistency" test – designed to detect state taxes that violate the Commerce Clause by exposing interstate commerce to a discriminatory risk of multiple taxation – applies in the case of a tax on intangible property?

2. Whether a tax on intangible property fails the "internal consistency" test if, as a result of its enactment by every state, an interstate business would pay multiple taxes on the full value of its intangible property while an exclusively intrastate competitor would pay only a single tax to its state of domicile?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSENT OF THE PARTIES	1
INTERESTS OF AMICI CURIAE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. FLORIDA'S INTANGIBLE PERSONAL PROP- ERTY TAX DIRECTLY IMPACTS INTERSTATE COMMERCE	7
II. THE INTERNAL CONSISTENCY TEST MUST BE APPLIED IN EVALUATING FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX ..	10
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES:

<i>Allis-Chalmers Credit Corp. v. Department of Revenue</i> , 456 So.2d 899 (Fla. 1st DCA), <i>pet. for rev. denied</i> , 458 So.2d 271 (Fla. 1984)	8
<i>American Trucking Associations, Inc. v. Scheiner</i> , 483 U.S. 266 (1987)	<i>passim</i>
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	18
<i>Boston Stock Exch. v. State Tax Comm'n.</i> , 429 U.S. 318 (1977)	18, 21
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	10
<i>Complete Auto Transit v. Brady</i> , 430 U.S. 274 (1977)	11, 15, 18, 19, 21
<i>Container Corporation of America v. Franchise Tax Board</i> , 463 U.S. 159 (1983)	11, 12
<i>Curry v. McCanless</i> , 307 U.S. 357 (1939)	15, 17
<i>D.H. Holmes Co., Ltd. v. McNamara</i> , 486 U.S. 24 (1988)	10
<i>Florida Steel Corp. v. Dickinson</i> , 328 So.2d 418 (Fla. 1976)	7
<i>Ford Motor Credit Co. v. Department of Revenue</i> , 537 So.2d 1011 (Fla. 1st DCA 1988), <i>review denied</i> , 542 So.2d 988 (Fla. 1989)	6, 7, 14
<i>General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida</i> , Case No. 86-2526 (Fla. 2d Cir. Ct.)	3
<i>Goldberg v. Sweet</i> , 488 U.S. 252 (1989)	17, 18, 19

TABLE OF AUTHORITIES - Continued

	Page
<i>International Harv. Co. v. Dep't. of Treasury</i> , 322 U.S. 340 (1944)	17
<i>Japan Line, Ltd. v. Los Angeles County</i> , 441 U.S. 434 (1979)	15
<i>Mobil Oil Corp. v. Commissioner of Taxes</i> , 445 U.S. 425 (1980)	14, 15
<i>Northwestern States' Portland Cement Co. v. Minnesota</i> , 358 U.S. 450 (1959)	18
<i>Pullman's Palace Car Co. v. Commonwealth of Pa.</i> , 141 U.S. 18 (1891)	14, 16
<i>State Tax Commission of Utah v. Aldrich</i> , 316 U.S. 174 (1942)	17
<i>Tyler Pipe Industries, Inc. v. Washington Department of Revenue</i> , 483 U.S. 232 (1987)	<i>passim</i>
<i>Western Live Stock v. Bureau of Revenue</i> , 303 U.S. 250 (1938)	10
STATUTES:	
Fla. Stat. § 199.112(1) (1983)	8, 9, 12

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ACCEPTANCE CORPORATION, and GENERAL
MOTORS CORPORATION in Support of Appellant

CONSENT OF THE PARTIES

Both Ford Motor Credit Company, Appellant, and the State of Florida, Department of Revenue, Appellee, have consented to the filing of this brief. Their consents have been filed with this Court.

INTERESTS OF AMICI CURIAE

Caterpillar Inc. ("Caterpillar") is a Delaware corporation with its principal place of business in Peoria, Illinois. It is a multinational company which is engaged in the design, manufacture and sale of earthmoving, construction, and material handling equipment. Caterpillar engages in these business activities in numerous countries and states, including Florida. In the course of such activities, Caterpillar sells its equipment on open account and thereby creates intangible assets used in interstate commerce. As a result, Florida has subjected Caterpillar to its tax on intangibles, and Caterpillar's tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Clark Equipment Company ("Clark") is a Delaware corporation with its principal place of business in South Bend, Indiana. It is a multinational company engaged in the design, manufacture and sale of equipment to move materials, systems to transfer power, and products for industrial application. Clark engages in these activities in numerous foreign countries and states, including Florida. In the course of such activities, Clark finances certain purchases and therefore creates various intangible assets used in interstate commerce. As a result, Florida has subjected Clark to its tax on intangibles, and its tax liability to the State of Florida will be directly affected by the outcome of this appeal.

Chase Manhattan Leasing Company (Michigan), Inc. ("Chase Manhattan") is a Michigan corporation with its principal place of business in Buchanan, Michigan. It is engaged in the financing of wholesale and retail sales of equipment in numerous states, including Florida. These

activities result in the creation of various types of intangible assets used in interstate commerce. Accordingly, Florida has subjected Chase Manhattan to its tax on intangibles, and Chase Manhattan's tax liability to the State of Florida will be directly affected by the outcome of this appeal.

General Motors Acceptance Corporation ("GMAC"), a wholly owned subsidiary of General Motors Corporation, is a New York corporation with its principal place of business in Detroit, Michigan. It is engaged in the financing of wholesale and retail sales of vehicles manufactured by General Motors Corporation in numerous states, including Florida. These activities result in the creation of intangible assets used in interstate commerce. Accordingly, Florida has subjected GMAC to its tax on intangibles. GMAC is currently litigating the imposition of this tax in *General Motors Acceptance Corp. v. Comptroller and Dept. of Revenue, State of Florida*, Case No. 86-2526 (Fla. 2d Cir. Ct.), and the issues now before this Court have been raised in that litigation. As a result, the outcome of this proceeding will affect GMAC's pending litigation.

General Motors Corporation ("GM") is a Delaware corporation which maintains its principal place of business in Detroit, Michigan. It is a multinational company engaged in the design, manufacture and sale of vehicles. GM engages in these business activities in numerous countries and states, including Florida. In the course of such activities, GM engages in various types of financing activities. These business activities result in the creation of intangible assets used in interstate commerce. As a result, Florida has subjected GM to its tax on intangibles, and its tax liability to Florida will be directly affected by the outcome of this appeal.

Amici Curiae are extensively engaged in interstate commerce and are subject to a variety of taxes imposed by numerous states and localities. In addition to this particular appeal, Amici Curiae have a strong interest in protecting interstate commerce from discriminatory and unduly burdensome state and local taxation. Specifically, Amici Curiae are subject to taxes based upon their intangible property and are concerned that their intangible property will be subjected to multiple tax burdens. The Court's disposition of this appeal will not only directly affect the pending actions and tax liabilities of Amici Curiae, but will also affect the future development of state and local taxation in a manner which will have a far-reaching, long-term effect on activities engaged in by Amici Curiae.

SUMMARY OF THE ARGUMENT

As a practical matter, the District Court of Appeal of Florida, First District, has created an exemption from the provisions of the Commerce Clause of the United States Constitution for Florida's intangible personal property tax. The Florida court created this exemption by declining to apply the internal consistency test in resolving a Commerce Clause challenge to Florida's intangible personal property tax.

Florida imposes an unapportioned tax on intangible personal property in three separate circumstances: (1) when the owner of the intangible has a Florida domicile; (2) when the sale that gives rise to the intangible is a Florida sale in the ordinary sense of that term; and (3) by creating a conclusive presumption of a Florida sale,

through creation of a deemed "business situs," when a sale results in delivery of the underlying property in Florida. The tax is applied as of January 1st of each year to the outstanding balance of the intangibles.

Unlike the usual ad valorem property tax, Florida's intangible tax is imposed without regard to the current location of the intangible, the current location of the underlying property which was the subject of the sale from which the intangible arose, or the current location of the debtor. Although only the specific activities outlined above are of consequence in subjecting intangibles to the Florida tax, Florida continues to impose the tax each year which the intangible remains outstanding.

If other states adopted Florida's taxing scheme, taxpayers domiciled elsewhere but engaged in interstate commerce in Florida would be subjected to an annual tax on their intangible property in their state of domicile, in the state in which the sale generating the intangible actually occurred, and in any other state in which the property was delivered to the purchaser. Under such circumstances, those taxpayers engaged in interstate commerce would be taxed on 100% of the unit value by as many as three different states.

Taxpayers domiciled in Florida and doing business only in Florida would pay only one tax on the unit value of their intangibles. Accordingly, Florida's taxing scheme impermissibly discriminates against interstate commerce in violation of the Commerce Clause by imposing a greater burden on those engaged in interstate commerce than on those doing business solely within Florida.

ARGUMENT

The issue before this Court is whether Florida's intangible ad valorem tax system violates the Commerce Clause of the United States Constitution. The answer to this question involves a determination of whether the internal consistency test used by this Court to resolve Commerce Clause challenges applies to intangible property created and used in interstate commerce and whether Florida's tax is internally inconsistent.

Florida's First District Court of Appeal ("the Florida court") declined to apply the internal consistency test in analyzing Appellant's Commerce Clause challenge to Florida's intangible personal property tax. *Ford Motor Credit Co. v. Department of Revenue*, 537 So.2d 1011, 1013 (Fla. 1st DCA 1988), *review denied*, 542 So.2d 988 (Fla. 1989).

The internal consistency test is critically important in analyzing Florida's intangible tax because the tax is not limited to intangibles arising from a single discrete event, such as a sale, but rather taxes intangibles based on multiple events, such as domicile, sale, or delivery. As a result, Florida's taxing scheme allows multiple states to impose a tax on a single unit of value, the intangible, without apportionment. If Florida's tax is upheld, any state in which one of several triggering activities occurs could impose a tax on 100% of value of the intangible. If allowed to stand, the decision below, and similar decisions by other state courts, will substantially curtail this Court's establishment of a consistent and rational analysis which can be used to determine whether a state tax impermissibly burdens or discriminates against interstate commerce.

A refusal by state courts to utilize the internal consistency test in resolving Commerce Clause challenges to state taxation will have a material and adverse impact on taxpayers engaged in interstate commerce. The constant need of the various states for new revenues, the evolving complexity of their taxing schemes, and the extent of modern day interstate commerce combine to heighten the severity of such an adverse impact.

I. FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX DIRECTLY IMPACTS INTERSTATE COMMERCE.

The Florida court, while acknowledging that discrimination against interstate commerce is prohibited, refused to apply the internal consistency test in its analysis of Florida's tax and found that Florida's taxing scheme did not violate the Commerce Clause. *Id.* at 1013. Although the Florida court stated that its refusal to apply the internal consistency test was based on a distinction between property taxes and excise and income taxes, its holding is also based on a finding that interstate commerce is not involved. The Florida court found that "[t]he contested intangible tax in the present case is not integrally related to interstate commerce" *Id.* at 1012. In reaching this conclusion, the Florida court failed to address the interstate nature of the intangibles which Florida taxes.

Florida's intangible tax is imposed in three separate circumstances: (1) when the owner of the intangible has a Florida domicile;¹ (2) when the sale which gives rise to

¹ See *Ford Motor Credit*, 537 So.2d at 1012, citing, *Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976).

the intangible is a Florida sale; or (3) when the sale which gives rise to the intangible results in a delivery of the property to a purchaser in Florida. Fla. Stat. § 199.112(1) (1983). In this latter circumstance, the Florida scheme creates a presumption of a Florida sale, and thus taxable situs, regardless of where the sale actually occurs.

The imposition of the tax is triggered by any one of these activities and is applied on January 1 of each year to the outstanding balance of such intangibles regardless of their subsequent location. The annual tax, which is imposed without apportionment, may impact interstate commerce for years after the creation of the intangible. Once determined, the taxability of the intangible is not impacted by subsequent changes in the location of the debtor or where the intangible is kept or paid.² This type of tax scheme has a substantially greater impact on interstate commerce than a localized real or tangible personal property ad valorem tax on property whose actual tax situs is established on a year-to-year basis or an excise tax based on an exclusive discrete in-state event.

Contrary to the Florida court's determination, a review of Florida's taxing statute clearly demonstrates that many of the intangibles it taxes are a part of interstate commerce. By utilizing a tax scheme that would establish a tax situs for intangibles in multiple states, Florida acknowledges that such intangibles are not discrete assets physically located in one particular state, but

² See *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So.2d 899 (Fla. 1st DCA), *pet. for rev. denied*, 458 So.2d 271 (Fla. 1984).

rather are assets that have various characteristics present in a number of states at the same time.

Furthermore, Florida specifically excludes certain characteristics of intangibles from the determination of the location of the business situs of the intangibles, i.e., "where they are kept, approved as to creation, or paid." Fla. Stat. § 199.112(1) (1983). By taking this approach, Florida seeks to make the domicile of the owner of the intangible, the place of sale, or the location of the purchaser at the time of delivery of property the only relevant factors in determining the tax situs of any resulting intangibles. Thus, every year thereafter, until the intangible is paid in full, the Florida statute hypothecates a Florida situs based on these original activities. The usual ad valorem tax system, unlike Florida's tax scheme, focuses not on where the intangible is created, but rather on the location of the intangible on the date the annual ad valorem tax is imposed. Florida's approach demonstrates that these intangibles are a part of interstate activities and that to establish a tax situs in Florida, a number of characteristics pertinent to determining a physical location of an intangible must be eliminated from consideration in order to achieve the result desired by Florida.

As early as 1938, this Court recognized:

The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. . . . Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state.

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256 (1938). The intangible evidencing such a receipt likewise is part of interstate commerce.

In finding that Florida's tax is not integrally related to interstate commerce, the Florida court focused upon certain narrow, intrastate activities surrounding the creation of the intangibles. The argument that a state could focus solely upon a single intrastate activity and evade the Commerce Clause's application was rejected in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981). Today, the Commerce Clause may be implicated if the local activity involves goods which may eventually enter into interstate commerce. See also *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988). Given the multiple interstate activities which create a basis for taxation under Florida's taxing scheme, there can be no doubt that Florida's intangible tax reaches interstate activity with a significant impact.

II. THE INTERNAL CONSISTENCY TEST MUST BE APPLIED IN EVALUATING FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX.

If other states adopted Florida's taxing scheme, taxpayers engaged in interstate commerce would be subject to taxation of their intangibles in their states of domicile, in the state in which the sale generating the intangible actually occurs, and in the state where the property is delivered. Because of this multiple taxation of the same intangible, taxpayers which only engage in intrastate commerce will be provided a clear economic advantage over those engaged in interstate commerce in violation of

the Commerce Clause. Indeed, this Court recently held that tax schemes which permit multiple jurisdictions to tax the same discrete event without apportionment are violative of the internal consistency test. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court declared that interstate commerce must bear its fair share and that such commerce would no longer be immune from state taxation. A four-prong test was developed which required that an activity subject to tax have a substantial nexus to the taxing state, that the tax be fairly apportioned, that the tax not discriminate against interstate commerce, and that the tax be fairly related to the services provided. *Id.* at 279.

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court, applying *Complete Auto* to California's corporate unitary taxing scheme, articulated the "internal consistency" requirement that a state's taxing scheme be "fair." By fair, the Court stated "the formula must be such that, if applied by every other jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169. Florida's system is not "fair." It has no apportionment.³

³ Florida does have the option of defining a different tax base for intangibles. This includes taxing only the intangibles of Florida domiciled companies or only the intangibles resulting from Florida sales. Florida's taxing scheme could be based on numerous discrete activities which would only subject intangibles to taxation in one state. However, the tax base defined by the taxing statute at issue in this case requires apportionment.

In *Container Corporation*, the state had imposed a franchise tax tied to the income of multistate enterprises. As there was but a single unit of income to be taxed, this Court utilized the internal consistency test in an analysis which resulted in the state tax being found valid. Such is the nature of the Florida scheme. A single unit of value, the intangible, will be subjected to tax by multiple jurisdictions. The Florida scheme on its face reaches out of Florida into the interstate arena and subjects commerce (the intangibles) to an unapportioned tax "regardless of where [the intangibles] are kept, approved . . . or paid." Fla. Stat. § 199.112(1). The statute specifically provides, that it is to, "apply to any person representing business interests in the State that may claim a domicile elsewhere." Fla. Stat. § 199.112(1). This tax is substantially more than a single local property tax, and the internal consistency test must be applied.

Subsequent to *Container Corporation*, this Court has maintained the vitality of the internal consistency test in evaluating income, excise, and flat-rate taxes. There appears to be no disagreement that a multistate enterprise subject to an income tax is entitled to an apportionment of the unitary value ("the income") to arrive at an appropriate allocation of the value to the respective taxing jurisdictions. *Container Corporation, supra*. The members of this Court, however, have not been unanimous as to the application of the internal consistency test in other than the income tax context. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232, 254 (1987) (O'Connor, J., concurring; Scalia, J., joined by the Chief Justice, concurring in part and dissenting in part); *American Trucking Associations v. Scheiner*, 483 U.S. 266,

298 (1987) (O'Connor, J., joined by the Chief Justice and Powell, J., dissenting; Scalia, J., joined by the Chief Justice, dissenting).

Because they argue there is no unitary figure or event to apportion when a tax is based on a discrete event which can occur in one or more jurisdictions, not all members of this Court have agreed to apply the internal consistency test to state taxes which are based on an event which can occur in either a single state or in different states. *Tyler Pipe*, 483 U.S. at 256. The factual situations with which the dissenting opinions in *Tyler Pipe* and *American Trucking* are concerned are not present in this case.

The Florida intangible tax is not imposed as the result of a discrete event which can occur in a single state or in multiple states. Rather, the Florida intangible tax is imposed on a unit value as a result of various discrete events, and while these events can individually occur only in one state at a particular moment in time, different individual events can occur simultaneously. Thus, Florida's taxing scheme results in the taxing of a unitary value by multiple jurisdictions. In application, therefore, Florida's system of taxing intangibles is like that of an income tax.

Under Florida's taxing scheme, two states would not impose a tax on the same intangible as a result of the same discrete event occurring in each of their specific jurisdictions. They would impose it because of different events. This would be similar to an income tax being imposed by multiple states as a result of the taxpayer's activities exclusive to that state. Under Florida's intangible tax, just

like an income tax, each state would claim 100% of the value of the intangible as subject to its tax as a result of an event occurring in that state and only in that state. For example, assume that three states adopt Florida's taxing scheme. A taxpayer can have only one domicile, and the state where a taxpayer is domiciled would impose the tax on 100% of the intangible. The state where the sale occurs would tax 100% of the intangible, and there is only one such state. The state where the property is delivered would also impose the tax at 100% of the value of the intangible, and obviously the property can be delivered in only one state.

If each of these events exists in separate states, each state would impose the tax on 100% of the intangible. Just as with an income tax, the separate activities exclusive to the state give rise to that state taxing the value as a whole. If the internal consistency test is validly applied in an income tax context, it likewise must be applied in analyzing Florida's taxing scheme. Because the taxation of income and Florida's taxation of intangibles can result from discrete events in different states triggering a tax of a unit value, the two circumstances have an identical effect on interstate commerce. The internal consistency test must be applied in evaluating the constitutionality of Florida's intangible tax system. Even if the test is not categorically applicable to all "property taxes," *per se*, it must be applied to schemes like Florida's.

In support of its conclusion that the internal consistency test does not apply to property taxes, the Florida court cites *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) and *Pullman's Palace Car Co. v. Commonwealth of Pa.*, 141 U.S. 18 (1891). *Ford Motor Credit*, 537

So.2d at 1013. Although these cases do contain certain distinctions between property taxation and excise and income taxation, these distinctions were not made in a context which would support the proposition that the internal consistency test is not part of modern day Commerce Clause analysis or is not applicable to property taxes.

In *Mobil Oil*, the contention was rejected that there was something talismanic about the taxation of intangibles that immunized dividends from the application of *Complete Auto* and its apportionment prong. Noting that the theories of taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, the Court stated that the theory of taxing property by allocation to a single situs no longer applies when the taxpayer's activities involve relations with more than one state. *Id.* at 445, citing *Curry v. McCanless*, 307 U.S. 357 (1939). This Court approved that state's apportioned tax upon dividends and limited the commercial domicile's right to exclusively tax the intangibles when benefits and privileges are conferred by many states. *Id.* at 445-46.

Contrary to the Florida court's holding, the principle to be gleaned from *Mobil Oil* is not that differences continue to exist between property and other forms of taxation, but rather that, absent exceptional circumstances, taxation of property involved in interstate commerce is to be by apportionment, rather than by allocation to a single situs. In *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979), this Court noted that, prior to *Complete Auto*, the theory of property taxation was through allocation of the full value to the domicile of the owner, but this theory is

no longer used and property involved in interstate commerce is now to be taxed according to the rule of fair apportionment and nondiscrimination. 441 U.S. at 442.

In *Pullman's Palace*, the other case cited by the Florida court for declining to apply the internal consistency test, this Court characterized a tax on the capital of a non-domiciled railroad corporation as a tax on the corporate property within the taxing state and upheld the tax because the tax was fairly apportioned. *Pullman* represents an early precursor to the proposition that an intangible tax such as a tax on a corporation's capital stock must be apportioned if the property by which the tax is measured is a part of interstate commerce. The Court in *Pullman* recognized that, under an apportionment formula, if other states imposed a similar taxing system, only the full measure of value would be taxed and no more. 141 U.S. at 617-18. This cannot be said of Florida's scheme. This Court in *Pullman* measured the statute's validity by reference to its internal consistency. So, too, Florida's system's validity must be measured by its internal consistency.

In support of its conclusion that the internal consistency test has no application to a property tax case, the Florida court also cites the dissenting opinions by Justice O'Connor and Justice Scalia in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), and Justice Scalia in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987). These dissenting opinions, however, object generally to this Court's use of the internal consistency test in a circumstance other than one in which a taxing statute results in multiple jurisdictions validly seeking to impose tax on a single unitary

value or an event necessitating apportionment. Contrary to the Florida court's conclusion, the existence of these dissenting opinions emphasizes the determination of this Court's majority to follow the internal consistency doctrine when analyzing Commerce Clause challenges to state taxes.⁴

The Florida court erroneously relies on a due process analysis in reaching its conclusion that Florida's taxing scheme does not discriminate against interstate commerce. In support of its due process analysis, the Florida court cites to *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCanless*, 307 U.S. 357 (1939). While admitting that those cases involve only due process challenges, the Florida court found little reason to doubt their application since a tax which will "satisfy the due process clause generally will satisfy the commerce clause." 537 So.2d at 1012.

Contrary to the Florida court's holding, the Commerce and the Due Process Clauses are not synonymous, and a tax which satisfies the Due Process Clause does not *per se* satisfy all the elements of the Commerce Clause. See, e.g., *International Harv. Co. v. Dep't of Treasury*, 322 U.S. 340, 352-62 (1944) (Rutledge, J., concurring). Specifically, the apportionment and discrimination prongs of *Complete Auto* must also be satisfied. See *Goldberg v. Sweet*, 488 U.S. 252 (1989). *Curry* and *Aldrich* involve, at most, nexus and benefit issues, the first and fourth prongs of the *Complete Auto* test. To the extent those cases involve

⁴ It must be emphasized that the circumstance objected to by the dissents are not present in the Florida scheme. See pp. 12-14, *supra*.

apportionment and discriminatory issues, they have been superseded by *Complete Auto*.

Since this Court articulated the internal consistency test, it has consistently held that the internal consistency test is an integral part of any Commerce Clause analysis under *Complete Auto*. See *Goldberg v. Sweet*; *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988); *American Trucking Associations, Inc. v. Scheiner*; *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*; *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). This Court has never indicated an intention to limit application of the internal consistency test in evaluating the constitutionality of an ad valorem tax system. There is no basis for the Florida court's conclusion that internal consistency does not apply to a Commerce Clause analysis of an intangible tax such as Florida's. To the contrary, the multiple activities on which the tax is predicated necessitate the tax be subjected to review under the internal consistency test. This is especially true where multiple jurisdictions will be imposing a tax on a single unit of value, the intangible.

This Court has previously termed its decisions on state tax measures a "quagmire" of judicial responses, in which the case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States' Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959); see also *American Trucking Associations*; *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318 (1977). The internal consistency test sweeps clear this confusion. It applies a rational, objective test for examining the constitutionality of a state tax to ensure that taxpayers who engage only in intrastate

commerce will not be provided an economic advantage over those engaged in interstate commerce.⁵ Proof of actual multiple taxation is not required in applying the internal consistency test. *Goldberg*, 488 U.S. at ___, 109 S.Ct. at 589; *Tyler Pipe*, 483 U.S. at 246. Rather, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other states have passed an identical statute. *Goldberg*, 109 S.Ct. at 589. Thus, each tax must stand or fall on its own provisions. *American Trucking Associations*, 483 U.S. at 289. As *Armco* noted, no longer does the constitutionality of a state tax depend upon the shifting complexities of the other states and the particular states in which the taxpayer operates. Under the internal consistency test, certainty is enhanced for both taxpayers and states.

The need to review the internal consistency of a tax scheme is as applicable to Florida's intangible tax as it was to "the multiple activities exemption" in *Tyler Pipe* and *Armco, Inc.* A multiple activities exemption such as the one addressed in *Tyler Pipe* burdens interstate commerce in the same manner as a tax on intangibles which result from multiple activities. Although Florida has not designed its taxing scheme through the creation of exemptions, it has reached the same result by imposing one tax on tangibles and by basing this tax on characteristics of the intangible which are created by multiple activities. The result is that the various individual activities

⁵ Although apportionment had long been required for state taxes, that requirement has assumed greater significance following *Complete Auto's* holding that interstate commerce must bear its fair share.

which cause the unit value of an intangible to be subjected to tax under Florida's taxing scheme can occur in multiple states at the same time. Thus, the same burdens faced by taxpayers in *Tyler Pipe* and *Armco* are faced by taxpayers in Florida. The fact that a tax is described as an intangible tax should not change the constitutional standard by which the system is to be measured and the same standard applied in *Armco* and *Tyler Pipe* should be applied here.

The economic reality of Florida's tax is that it does not impose a tax on property located exclusively in Florida, but on gross receipts which are financed and which are derived from Florida sales by nondomiciled taxpayers or from Florida and non-Florida sales made by Florida domiciled taxpayers. This Court has stated that the analysis of a state tax should be based on the economic substance of the tax. *Complete Auto*, 430 U.S. at 288. The Florida tax is even more egregious than the taxes at issue in *Armco* and *Tyler Pipe* because the Florida tax is an annual value based tax and the intangible may be taxed repeatedly by multiple jurisdictions until paid in full. When viewed under the internal consistency test, it is clear that Florida's tax "exerts an inexorable hydraulic on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *American Trucking Associations*, 483 U.S. at 286-87.

The Florida court's decision is in conflict with existing decisions of this Court by failing to apply *Complete Auto*, *Container Corporation*, and their progeny. Florida has carved out an exception to the Commerce Clause in violation of this Court's previous holdings. This requires

this Court to resolve, once again, "the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977).

CONCLUSION

The decision of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

KENNETH R. HART
ROBERT A. PIERCE and
STEVEN P. SEYMOE of
AUSLEY, McMULLEN, McGEHEE,
CAROTHERS & PROCTOR
Post Office Box 391
Tallahassee, Florida 32302
904/224-9115
Attorneys for Amici Curiae